No. 94-226-CFX
Status: GRANTED

Docketed:
August 3, 1994

Title: Florida Bar, Petitioner
v.
G. Stewart McHenry, Went For It, Inc. and John T. Blakely,

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Richard,Barry Scott

Counsel for respondent: Rogow,Bruce

NOTE: 080994 Counsel's sec states his name is corr as above

Entry	Date	Note	Proceedings and Orders
1	Aug 3 1994	G	Petition for writ of certiorari filed.
2	Aug 30 1994		Brief of respondents G. Stewart McHenry, et al. in opposition filed.
3	Sep 7 1994		DISTRIBUTED. September 26, 1994 (Page 146)
4	Sep 26 1994		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m.,Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. Rule 29.2 does not apply. **********
5	Nov 4 1994		Brief of petitioner Florida Bar filed.
6	Nov 7 1994		Brief amici curiae of Alabama State Bar Association, et al. filed.
7	Nov 8 1994		Brief amicus curiae of New York State Bar Association filed.
8	Nov 8 1994		Brief amici curiae of Dade County Trial Lawyers Association, et al. filed.
9	Nov 8 1994		Brief amicus curiae of Association of Trial Lawyers of America filed.
10	Nov 8 1994		Brief amicus curiae of Academy of Florida Trial Lawyers filed.
11	Nov 14 1994		SET FOR ARGUMENT WEDNESDAY, JANUARY 11, 1995. (2ND CASE)
13	Nov 17 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eleventh Circuit.
12	Nov 18 1994		CIRCULATED.
14	Nov 30 1994		Record filed.
		*	Original record proceedings United States District Court for the Middle District of Florida.
15	Dec 5 1994	X	Brief amicus curiae of Public Citizen filed.
16	Dec 5 1994	X	Brief amici curiae of The Media Institute, et al. filed.
17	Dec 6 1994	X	Brief amicus curiae of Hyatt Legal Services filed.
18	Dec 6 1994	X	Brief amici curiae of Institute for Access to Legal Services, et al. filed.
19	Dec 6 1994	X	Brief of respondents G. Stewart McHenry, et al. (TO BE

No. 94-226-CFX

Entry	Date	Note	Proceedings and Orders
			REPRINTED) filed.
20	Dec 20 1994	X	Reply brief of petitioner filed.
21	Jan 3 1995	G	Motion of petitioner to dispense with printing the joint appendix filed.
22	Jan 11 1995		ARGUED.
23	Jan 17 1995		Motion of petitioner to dispense with printing the joint appendix GRANTED.

Supreme Court, U.S.
FILED

94 226 AUG - 3 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

BARRY RICHARD
GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

71pp

QUESTIONS PRESENTED FOR REVIEW

I

Whether the limits placed upon state authority by the decision below extend beyond any heretofore recognized by this court and provide lawyers with a greater degree of insulation from regulation of commercial solicitation than other groups.

II

Whether the challenged rules are narrowly tailored to serve substantial governmental interests and do not violate the First Amendment to the United States Constitution.

III

Whether Rules 4-7.4(b) and 4-7.8(a), Rules Regulating the Florida Bar, are valid time, place or manner restrictions.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

LOWER COURT REPORTS AND OPINIONS 1

JURISDICTIONAL GROUNDS 1

CONSTITUTIONAL PROVISION AND RULES INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 6

I THE LIMITS PLACED UPON STATE AUTHORITY BY THE DECISION BELOW EXTEND BEYOND ANY HERETOFORE RECOGNIZED BY THIS COURT AND PROVIDE LAWYERS WITH A GREATER DEGREE OF INSULATION FROM REGULATION OF COMMERCIAL SOLICITATION THAN OTHER GROUPS 6

II THE CHALLENGED RULES ARE NARROWLY TAILORED TO SERVE SUBSTANTIAL GOVERNMENTAL INTERESTS AND DO NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION 11

III THE CHALLENGED RULES ARE VALID TIME, PLACE OR MANNER RESTRICTIONS 15

TABLE OF AUTHORITIES

Page

CASES

Bates v. State of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) 6, 9, 10, 11, 20

Board of Trustees v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) 11

Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) ..7, 11

Clark v. Community for Creative Non-violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) 15, 17

Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) 12, 13

Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) 8

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) 8

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) 8

Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448 (1949) ... 12, 13

Matter of Anis, 599 A.2d 1265 (N.J. 1992) 14

Members of City Counsel v. Taxpayers for Vincent, 466 U.S. 806, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) 12, 13

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) 11

Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990) 7

TABLE OF AUTHORITIES – Continued

Page

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) 8

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) 18

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) 7

Ward v. Rock Against Racism, 491 U.S. 78, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) 16, 17, 18

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) 7

OTHER AUTHORITIES

Rule 4-7.4(b), Rules Regulating The Florida Bar ... 2, 4, 18

Rule 4-7.8(a), Rules Regulating The Florida Bar 4

28 U.S.C., § 1254(1) 1

28 U.S.C., § 1331 4

Amendment I, United States Constitution ...1, 5, 8, 17, 19

Amendment XIV, Section 1, United States Constitution 1, 5

LOWER COURT REPORTS AND OPINIONS

Report and Recommendation of U.S. Magistrate Judge, Case No. 92-370-CIV-T-17A (M.D. Fla., August 5, 1992) [App. 1]

Order on Report and Recommendation, Case No. 92-370-CIV-T-17A (M.D. Fla., August 5, 1992) [App. 18].

McHenry v. The Florida Bar, ___ F.2d 2258 (11th Cir. 1994) [App. 30]

JURISDICTIONAL GROUNDS

This is a petition to review a decision of the United States Court of Appeals for the Eleventh Circuit entered on May 10, 1994. This Court has jurisdiction pursuant to 28 U.S.C., § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Amendment I, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

RULE 4-7.4(b), Rules Regulating The Florida Bar:

(b) Written Communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

RULE 4-7.8(a), Rules Regulating The Florida Bar:

(a) When Lawyers May Accept Referrals. A lawyer shall not accept referrals from a lawyer referral service unless the service:

(1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer;

STATEMENT OF THE CASE

In 1987, ten years after this Court first held that attorneys had a constitutional right to advertise, The Florida Bar began a two-year study of lawyer advertising and solicitation. Among other things, the study included hearings throughout the state, a review of public commentary regarding attorney advertising, and a survey by a public opinion polling organization retained by the Bar to compile statistics on public attitudes toward attorney advertising and solicitation. The complete record of information compiled in the study was submitted to the Florida Supreme Court, along with a summary of the information, as part of a petition to amend the Rules Regulating The Florida Bar with respect to advertising and solicitation.[1]

The survey found that Florida adults have negative feelings about direct-mail advertising by attorneys. "They perceive this advertising to have minimal informational content and to contain messages that appeal to the emotions rather than to reason, especially of gullible or upset people." The summary includes the results of a survey of recipients of direct-mail attorney solicitation. The summary concludes that 56% of such recipients believe that contacting persons concerning accidents and similar events is a violation of privacy. The study found that a broad spectrum of the Florida news media, historically the most vigorous advocates of unfettered speech, had

[1] *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar-Advertising Issues*, 571 So.2d 451 (Fla. 1990). A copy of the summary which was before the Supreme Court at the time it adopted the new rules was introduced in the trial Court.

strongly condemned attorney advertising in general, and solicitation of recent accident victims or the families of victims in particular.

In February, 1991, the Florida Supreme Court adopted amendments to the advertising rules. Among the rules adopted were Rule 4-7.4(b) and Rule 4-7.8(a), Rules Regulating the Florida Bar. *The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar – Advertising Issues*, supra. Rule 4-7.4 prohibited lawyers from sending a written solicitation relating to an accident or disaster to the victim of such accident or disaster, or a relative of such victim, within thirty days after the accident or disaster. Rule 4-7.8 prohibits a lawyer from accepting a referral from a referral service which fails to comply with the rules regulating attorney communciations.

In March, 1992, G. Stewart McHenry and his wholly owned corporation, Went For It, Inc., filed this action in the Middle District of Florida, challenging Rules 4-7.4, and 4-7.8 Rules Regulating the Florida Bar, as being in derogation of the plaintiffs' free speech rights under the First Amendment to the United States Constitution. Jurisdiction of the District Court was invoked to review a question arising under the United States Constitution pursuant to 28 U.S.C., § 1331.

The Complaint alleged that McHenry had sent direct mail advertising letters concerning an action for personal injury to targeted accident victims within 30 days of the accident and wished to continue such practice in the future. Went For It, Inc. alleged that it wished to conduct business in Florida as a lawyer referral business, and that it desired to contact accident victims and their families by

mail within 30 days of an accident and to refer interested persons to personal injury attorneys in Florida.

On October 24, 1992, McHenry was disbarred by the Florida Supreme Court for conduct unrelated to the issues raised in this action.[2] McHenry's case was thereby rendered moot and the action continued on the claim of Went For It, Inc. The parties all filed motions for summary judgment which were submitted to Magistrate Judge Charles Wilson for consideration. Judge Wilson received briefs and heard oral argument, and issued his Report and Recommendation. He found that Rule 4-7.4 served a substantial governmental interest and was narrowly tailored to achieve its desired objective. Judge Wilson additionally found that the provision was a reasonable time, place or manner restriction and concluded that it did not violate the United States Constitution. He recommended that summary judgment be entered for the Bar. [App. 1]

The District Judge rejected the recommendation of Judge Wilson and held, as a matter of law, that the challenged rule violates the First, Fifth and Fourteenth Amendments to the United States Constitution. The Court granted summary judgment for the plaintiff. [App. 18]

The decision was appealed to the Eleventh Circuit Court of Appeals. After filing of the Notice of Appeal, the appellees moved, without objection, to add John T. Blakely as a plaintiff based upon identical allegations to

---

[2] McHenry, who had previously been publicly reprimanded twice, was disbarred for engaging in sexual misconduct in the presence of clients. *The Florida Bar v. McHenry*, 605 So.2d 459 (Fla. 1992).

those that had been made by McHenry. The case was temporarily remanded to the trial court for consideration of the motion and Blakely was added on December 17, 1993. On May 10, 1994, the Eleventh Circuit, while expressing dissatisfaction at what it perceived to be the necessary result, affirmed. [App. 30]

ARGUMENT

I

THE LIMITS PLACED UPON STATE AUTHORITY BY THE DECISION BELOW EXTEND BEYOND ANY HERETOFORE RECOGNIZED BY THIS COURT AND PROVIDE LAWYERS WITH A GREATER DEGREE OF INSULATION FROM REGULATION OF COMMERCIAL SOLICITATION THAN OTHER GROUPS.

In its opinion affirming the District Court decision, the Eleventh Circuit expressed dissatisfaction with what it perceived to be the result required by this Court's line of decisions in *Bates v. State of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and the cases that followed. The Circuit Court stated:

> Justice Powell predicted in *Bates* that recognizing First Amendment protections for attorney advertising would "effect profound changes in the practice of law, viewed for centuries as a learned profession." 433 U.S. at 389, 97 S.Ct. at 2712 (Powell, J., concurring in part and dissenting in part.) That prediction has proven true. Unfortunately, the resulting changes have not necessarily been for the better. We are disturbed that *Bates* and its progeny require the decision we reach today.

Id. at 2265. [App. 45-46] The concerns voiced by the Eleventh Circuit echo the comments of Justices O'Conner, Rehnquist and Scalia in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) and *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990).

The Eleventh Circuit, as other circuits, has acknowledged this Court's statement that states may regulate lawyer commercial solicitation "in the service of a substantial governmental interest," and "through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). Nevertheless, it has become clear that the lower federal courts perceive this Court's opinions to be such that, in practical effect, they leave no room for state regulation of lawyer solicitation which is not in-person or deceptive. If that perception is incorrect, it is important that the Court clarify the true boundaries of state authority. If the perception is accurate, the Court is respectfully urged to revisit the issue in order to avoid placing lawyers in a privileged class, beyond the bounds of regulation available for other groups. This Court has held that, "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). However, as noted under this Point and Point II below, the Eleventh Circuit opinion would accord lawyer commercial solicitation a greater degree of protection in certain respects than even political and ideological speech.

This Court has consistently held that the exercise of First Amendment freedoms, including speech, is subject to reasonable limitations when the nature of such exercise is detrimental to, or inconsistent with, the mission of the public institution within which the freedom is exercised. Thus, the Court has upheld such limitations in the fields of public employment, *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) ["The determination of whether a public employer has properly discharged an employee for engaging in speech requires 'a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "], penal institutions, *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) [Prisoners "retain those First Amendment rights of speech 'not inconsistent with . . . the legitimate penological objectives of the corrections system.' "], the armed forces, *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) ["The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."], and educational institutions, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) ["A school need not tolerate student speech that is inconsistent with its 'basic educational mission' . . . even though the government could not censor similar speech outside the school."]

The basic theme underlying all of the foregoing decisions is that the state must be given the latitude to regulate types of expression which are excercised within the context of certain fundamental public institutions when such expression is reasonably determined by the state to have an adverse impact upon the overall mission of the institution. Significantly, all of the above decisions involved the exercise of political, ideological or religious expression, the most highly revered of all free speech rights. It is indisputable that the administration of justice is at least as fundamental a mission as those involved in the cited cases. Attorneys who engage in commercial solicitation do so within the context of, and with potential adverse impact upon, our system of justice. Nevertheless, this Court's decisions regarding attorney commercial solicitation, at least as interpreted by the Eleventh and other circuits, have not accorded the states nearly the degree of deference provided in connection with the administration of other public functions.

This Court's opinion in *Bates v. State of Arizona*, supra, rested upon the presumption that attorney advertising would serve "individual and societal interests in assuring informed and reliable decisionmaking," and its finding of "the postulated connection between advertising and the erosion of true professionalism to be severely strained." Id. at U.S. 364, 368. The Court questioned the assertion that advertising would diminish attorneys' reputations in the community, noting that, "Bankers and engineers advertise, and yet these professions are not regarded as undignified." Id. at U.S. 369. In the seventeen years since the *Bates* decision, the development of attorney advertising, as suggested in the opinion below, has

not been as favorable as the *Bates* Court anticipated. One need only open the yellow pages of any major city telephone directory to realize that the great bulk of attorney advertising provides citizens with little or no useful information, and is far less professional than that engaged in by bankers, engineers and most other professionals. Studies such as that performed by The Florida Bar indicate that such advertising has resulted in a negative perception of, and loss of confidence in the legal profession. In his Report and Recommendation, the Magistrate Judge found:

> The Bar's two-year study of lawyer advertising and solicitation conducted preliminarily to the implementation of its advertising rule discloses that Florida adults, generally, have negative feelings about direct-mail advertising by attorneys. The public feels that attorneys who participate in direct-mail advertising sacrifice professionalism to promote their own pecuniary self-interest. Florida adults believe that direct-mail advertising promotes frivolous and unwarranted lawsuits, resulting in higher legal costs and belittling the legal profession.

[App. 6] It cannot be doubted that maintenance of public confidence in all elements of the judicial system is essential to a stable democracy. The states have been hamstrung, however, by the perception by lower federal courts that this Court's decisions leave little or no room for states to judge the impact of attorney advertising upon the judicial system and to act accordingly.

While the Court is encouraged to revisit the entire question of states' authority to regulate attorney solicitation, it is not necessary to do so in order to reverse the

lower Court decision. As Points II and III below illustrate, the lower Court's reluctant striking of the challenged rules was not necessitated by this Court's holdings.

II

THE CHALLENGED RULES ARE NARROWLY TAILORED TO SERVE SUBSTANTIAL GOVERNMENTAL INTERESTS AND DO NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Attorney advertising falls within the scope of commercial speech which this Court has afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values" and is subject to "modes of regulation that might be impermissible in the realm of non-commercial expression." *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978). Although regulation of constitutionally protected commercial speech does not have to meet the least restrictive means test, the Court has held that such regulation must directly advance a substantial governmental interest and be narrowly tailored to fit the governmental objective. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d (1980); *Board of Trustees v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

The State has a substantial interest in protecting the personal privacy and tranquility of persons who were themselves, or whose loved ones were, recent victims of

personal injury or death. This Court has recognized in a variety of areas that the State has a substantial interest in preserving the quality of life of its citizens. Indeed, that interest has been so substantial as to justify restrictions upon political and ideological speech. Thus, the Court has upheld ordinances prohibiting the posting of election signs on public property, *Members of City Counsel v. Taxpayers for Vincent*, 466 U.S. 806, 104 S.Ct. 2118, 2129, 80 L.Ed.2d 772 (1984), ["It is well settled that the state may legitimately exercise its police powers to advance esthetic values."], prohibiting the use on public streets of sound trucks emitting loud noises, *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 454 (1949), ["The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience."], and prohibiting ideological picketing directed at the residence of an individual. *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

In *Frisby*, the Court upheld a law which was passed for the purpose of prohibiting anti-abortion picketing outside the residence of a doctor accused of performing abortions. The court stated:

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.
>
> * * *
>
> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear [citations omitted] the home is different. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.

Id. at 2502. In a comment significantly descriptive of direct-mail solicitation, the Court noted that, "The type of picketers banned by the . . . ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted residence, and to do so in an especially offensive way." Id. at 2503. The Court's focus on the distinction between picketing directed at the general public and picketing directed at a specific individual is directly analogous to the distinction between mass media advertising and direct-mail solicitation. The Court's concern over "residential privacy" is also applicable to direct-mail solicitation since it is primarily directed to persons in their homes.[3]

The communication which is the subject matter of the challenged rules is no less an intrusion on personal privacy and tranquility and no less offensive than the election signs in *Taxpayers for Vincent*, the sound trucks in *Kovacs*, or the picketing in *Frisby*. To the contrary, in an important respect it is more intrusive and offensive because it involves a much more personal matter and it is

---

[3] A statistical analysis by The Florida Bar of direct-mail advertising submissions from April, 1991 through March, 1992 indicates that a minimum of 87% were sent to residential addresses. The actual figure is probably close to 100% since the source of the names and addresses of most accident victims is the Department of Motor Vehicles [R. 15], and Florida law requires that drivers list their residence addresses with the Department. § 322.08, Fla. Stat.

knowingly and intentionally directed at persons who are most vulnerable. In *Matter of Anis*, 599 A.2d 1265 (N.J. 1992), the Supreme Court of New Jersey described such conduct in its analysis of a restriction similar to Florida's:

> Nothing in the Constitution . . . requires us to countenance solicitation that intrudes upon victims or their families in the initial throes of their grief . . . . What we are talking about here . . . is conduct that is patently offensive to the common sensibilities of the community because it intrudes upon the private grief of victims or their families, serves only to compound their sorrow and solicits representation of them at a moment of their extreme vulnerability.
>
> * * *
>
> The non-intrusive nature of the communication in *Shapero* is what commended the solicitation to commercial speech protection. [citation omitted] In contrast, the form of solicitation at issue here is so universally condemned that its intrusiveness can hardly be disputed.
>
> * * *
>
> We have no doubt, then, that the commercial speech guarantees of the First Amendment do not protect attorney conduct that is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.

Id. at 1270. The lower court decision leaves us with an indefensible legal doctrine which holds that the State has a sufficiently substantial interest in protecting the "comfort and convenience" of its citizens from loud noise or

their "esthetic" sensibilities from political signs, but does not have a sufficiently substantial interest to protect them, in times of deep personal trauma, from crass commerical intrusion upon their private grief and residential tranquility "that is universally regarded as deplorable and beneath common decency."

III

THE CHALLENGED RULES ARE VALID TIME, PLACE OR MANNER RESTRICTIONS.

While commercial speech is given only a "subordinate position in the scale of First Amendment values," political and ideological speech sit at the very top of the scale. Nevertheless, even these most highly protected forms of speech are subject to reasonable time, place and manner restrictions:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community or Creative Non-violence, 468 U.S. 288, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). The lower court concluded that the challenged rules are not valid

time, place or manner restrictions because the thirty-day ban was not content-neutral.[4]

The Court's conclusion is not consistent with this Court's interpretation of "content-neutral":

> The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. [citation omitted] The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [citation omitted] Government regulation of expressive activity is content-neutral so long as it is "*justified* without reference to the content of the regulated speech."

Ward v. Rock Against Racism, 491 U.S. 78, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989) [emphasis by Court]. Thus, this Court has established that the mere fact that the content of a communication must be referred to in order

---

[4] Petitioner does not concede that the challenged rule requires reference to content in the first place. While the wording of the rule appears to focus on the content of the letter, in practical effect, it has nothing to do with content. Its application is based upon the nature of the intended recipient as an accident victim or family of a victim. It is not necessary for the Bar to review the content of a letter in order to determine whether or not the rule is applicable. The Bar need only determine the source of the list of recipients of the letter.

to determine whether the speech is subject to the regulation does not render it content-based. The question is whether the challenged regulation is "justified without reference to the content of the regulated speech." In *Ward*, the city attempted to regulate the volume of amplified music played in a public park. The case arose out of a concert sponsored by a group dedicated to the promotion of anti-racist views. The Court of Appeals struck the regulation, holding that the city had failed to prove that its regulation was the least restrictive means of regulating the volume. This Court agreed that music is a form of expression which is protected under the First Amendment and that the area in which the music was being played was a public forum, "in which the government's right to regulate expression is subject to the protections of the First Amendment." Id. at S.Ct. 2746. Nevertheless, the Court reversed. The state interest recognized in *Ward* as being sufficiently compelling has particular bearing on the case at bar:

> The principal justification for the sound-amplification guideline is the city's desire to control noise levels at Bandshell events in order to retain the character of Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline 'has nothing to do with content' [citation omitted] and it satisfies the requirement that time, place, or manner regulations be content neutral.

Id. at S.Ct. 2754.

The regulation in the case at bar meets the Supreme Court's definition of content-neutral because it is "justified without reference to the content of the regulated speech." The regulation is not intended to prohibit the message (solicitation of business), but, like the regulation in *Ward*, to avoid undue intrusion into the personal privacy of individuals during a particularly trying period. The regulation is limited to letters directed at victims of accidents or personal injury because that is the primary group which the state perceives to be in need of protection, not because of the content of the message. If the ban applied to all direct-mail solicitation the Court below would then undoubtedly have concluded that the regulation was overbroad because it would have reached solicitation that the state has no substantial interest in regulating.

The challenged rules also fall within the scope of the doctrine upon which this Court upheld the ordinance in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The ordinance prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, church, park or school. Like rule 4-7.4(b), the *Renton* ordinance required reference to the content of the motion pictures shown to determine whether the regulation was applicable to a particular theater. Nevertheless, the Court upheld the ordinance based upon the fact that it was "aimed not at the content of the films shown at 'adult motion picture theaters,' but rather at the secondary effects of such theaters on the surrounding community." Id. at U.S. 46. Similarly, the

challenged rule is not aimed at the content of the message, but at the secondary effects upon the legal profession, and ultimately upon our system of justice, occasioned by the public's reaction to the particular type of advertising.

The Court is also urged to consider that opinions like the one below often place undue emphasis on the content review element of the time, place or manner test as though it stands alone. The content review question is, in most cases, logically intertwined with the other two elements. If the regulation is narrowly drawn and there are truly ample alternative avenues of the same communication left open, it follows that it is highly unlikely that the regulation was directed at the content of the message.

The challenged Florida rules leave ample alternative means of communication. The rules are extremely narrow, applying only during a short 30-day period and only to one particular form of communication. Lawyers are free to communicate the same message by direct-mail at any time more than 30 days from the date of the accident or disaster and are free to communicate the same message by any other advertising mode during the 30-day hiatus. The Comments to Rule 4-7.4, as adopted by the Florida Supreme Court, makes specific reference to the alternative means of advertising available to lawyers pursuant to Rule 4-7.4, including "billboards and other signs, radio, television and recorded messages the public may access by dialing a telephone number".

In its initial opinion recognizing that attorney advertising was entitled to First Amendment protection, this Court expressly noted, "that there may be reasonable

restrictions on the time, place and manner of advertising." *Bates v. State Bar of Arizona*, supra at 97 S.Ct. 2709. It is difficult to conceive of a type of attorney solicitation regulation that would qualify under the time, place and manner doctrine if the challenged rules do not. The rules are both reasonable commercial speech restrictions and time, place and manner regulations, and are entitled to be upheld on either basis.

Respectfully submitted,

BARRY RICHARD
GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

G. STEWART McHENRY, and
WENT FOR IT, INC., a Florida
corporation,

Plaintiff,

v. CASE NO. 92-370-CIV-T-17A

THE FLORIDA BAR and SUSAN
V. BLOEMENDAAL, in her official
capacity as Assistant Staff Counsel of
The Florida Bar,

Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon **Plaintiffs' Motion For Summary Judgment (Doc. 10)** and **Defendants' Motion For Summary Judgment (Doc. 14)**.[1] The Court having considered all documents of record and the argument of counsel at the April 27, 1992 hearing, recommends that Plaintiffs' Motion for Summary Judgment be denied and that the Defendants' Motion for Summary Judgment be granted to the extent, and for the reasons, set forth below.

---

[1] United States Judge Elizabeth A. Kovachevich specifically referred these motions to the undersigned for report and recommendation. (Doc. 11)

Factual and Procedural Background

This dispute focuses upon a lawyer advertising rule that went into effect on April 1, 1991. Rule 4-7.4, *Direct contact with prospective clients,* prohibits direct mail advertising of legal services relating to actions for personal injury or wrongful death until more than thirty days have elapsed from the accident or disaster mentioned in the written communication.[2] The prohibition of Rule 4-7.4 is imputed to lawyer referral services in Rule 4-7.8.[3]

---

[2] Rule 4-7.4 provides in pertinent part:

(b) Written communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on behalf of himself, his firm, his partner, an associate or any other lawyer affiliated with him or his firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

a. The written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication.

[3] Rule 4-7.8 provides in pertinent part:

4-7.8 **Lawyer referral services.**

(a) A lawyer shall not accept referrals from a lawyer referral service unless the service:

(1) Engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer;

(b) A "lawyer referral service" is any person, group of persons, association, organization, or entity that receives a fee or charge for referring or causing the direct or indirect referral of a potential client to a lawyer drawn from a specific group or panel of lawyers.

Plaintiff G. Stewart McHenry has sent direct mail advertising letters for legal services relating to actions for personal injury to targeted accident victims within thirty days of their accidents, and wants to continue this practice in the future. Plaintiff Went for It, Inc. wishes to contact accident victims and their families by mail within thirty days of their accidents and refer them to personal injury attorneys in Florida.

When Defendants The Florida Bar and Susan V. Bloemendaal threatened Plaintiff G. Stewart McHenry with disciplinary action for violating Rule 4-7.4(b)(1)a, Plaintiffs filed this action for declaratory and injunctive relief pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202. Plaintiffs seek a declaration that 1) Rule 4-7.4(b)(1)a of the Rules Regulating The Florida Bar, imposing a thirty-day ban on certain direct mail lawyer advertising, violates the First, Fifth, and Fourteenth Amendments to the Constitution of the United States; and 2) Rule 4-7.8, which effectively imposes the thirty-day ban on lawyer referral services wishing to do business with Florida attorneys, similarly violates the First, Fifth and Fourteenth Amendments.

The Plaintiffs originally filed a motion for preliminary injunction requesting that the Court enjoin the Defendants from enforcing the challenged rules. However, after counsel conferred, the Plaintiffs withdrew their motion for preliminary injunction and the parties filed

cross motions for summary judgment. Oral argument on the motions was held on April 27, 1992.

Standard of Review

This circuit holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the non-moving party. *Sweat v. Miller Brewing Co.*, 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First Nat'l Bank of Mt. Pleasant*, 595 F.2d 994, 996-97 (5th Cir. 1979)[4], quoting *Gross v. Southern R.R. Co.*, 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The parties have stipulated that there are no genuine issues of material fact in this case. The Court, upon consideration of the matter, agrees. Summary judgment is therefore appropriate here.

ISSUE

The specific issue to be resolved is whether, as a matter of law, the Florida Bar's thirty-day ban on targeted, direct mail lawyer advertising violates the First, Fifth and Fourteenth Amendments to the United States Constitution.

---

[4] The case law of the Fifth Circuit prior to September 30, 1981 has been adopted as precedent in this judicial circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

DISCUSSION

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court decided that advertising by lawyers was a form of commercial speech entitled to First Amendment protection. Attorney advertising falls within the scope of commercial speech which the Supreme Court has afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values" and is subject to "modes of regulation that might be impermissible in the realm of non-commercial expression." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

A lawyer's constitutional right to engage in targeted, direct mail advertising was unequivocally established by the Supreme Court in *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988). In *Shapero*, the Court held that states may not impose an absolute ban on targeted, direct-mail solicitation by attorneys but could enact less restrictive measures to prevent deceptive and abusive advertisements. *Id.*, at 476-478. Commercial speech which is not misleading and which does not concern unlawful activities may be restricted if the restriction serves a substantial governmental interest and is imposed through means that directly advance that interest. *Id.* at 472. "Since state regulation of commercial speech 'may extend only as far as the interest it serves . . . state rules that are designed to prevent the 'potential for deception and confusion- . . . may be no broader than reasonably necessary to prevent the perceived evil." *Id.* (citations omitted).

In *Peel v. Attorney Regulation and Disciplinary Commission*, 496 U.S. 91 (1990), the Court again declined to allow a total ban on direct-mail attorney solicitation but allowed more limited regulations, ruling that "a total ban is unconstitutional, but such a ruling 'does not necessarily preclude less restrictive regulations of [such] commercial speech. *Id.* at 110, n.17.

Time, place and manner of limitations of the nature of those involved in this case are valid provided that they not only are narrowly tailored to serve a significant government interest, but are "content-neutral" and "leave open ample alternative channels of communication." *Perry Education Association v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983).

The first inquiry is whether there is a substantial governmental interest sought to be regulated by the thirty day ban. The Florida Bar's two-year study of lawyer advertising and solicitation conducted preliminarily to the implementation of its advertising rule discloses that Florida adults, generally, have negative feelings about direct-mail advertising by attorneys. The public feels that attorneys who participate in direct-mail advertising sacrifice professionalism to promote their own pecuniary self-interest. Florida adults believe that direct-mail advertising promotes frivolous and unwarranted lawsuits, resulting in higher legal costs and belittling the legal profession. The Florida Bar asserts that restraints on attorney advertising play a significant role in preserving the legal profession as a genuine profession rather than as a trade association.

The Bar further asserts that its thirty-day ban is necessary to serve two substantial interests: First, to protect individuals in a "sensitized state" who have recently suffered injury or lost loved ones, from undue influence, intimidation and over-reaching by lawyers using direct-mail solicitation; and second, to protect the "personal privacy and tranquility of persons who are themselves, or whose loved ones, were recent victims of personal injury or wrongful death." Defendant's memo at 5-7. These interests are supported by the summary of the record on the Florida Bar's petition to the Florida Supreme Court To Amend The Rules Regulating Lawyer Advertising attached to the affidavit of John Griffin (Doc. 15).

There is a substantial governmental interest to be served by enacting rules regulating targeted direct-mail advertising. State bar associations have the inherent authority to police the ethical standards of the profession within its area of authority. The regulations are intended to guard the public against misleading and abusive solicitation. Admittedly, the majority opinion in *Shapero* distinguishes targeted, direct mail solicitation from in-person solicitation, finding that the former "poses much less risk of over-reaching or undue influence' than does in-person solicitation". *Shapero, 486 U.S.* at 475, quoting *Zauderer v. Office of Disciplinary Counsel at Supreme Court of Ohio*, 471 U.S. 626, 642 (1985). "Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter . . . can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes . . . a letter like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Shapero,*

466 U.S. at 475 (citations omitted). Yet, *Shapero* recognizes that while misleading and deceiving communications may be avoided by other forms of regulation, targeted direct mail solicitation still presents lawyers "with opportunities for isolated abuses or mistakes, although such instances does not justify a total ban on that mode of protected commercial speech." *Shapero* at 476. *Shapero,* therefore leaves the door open to state regulation of such advertisements through less restrictive measures to prevent abuse, such as requiring that a personalized letter bear a label identifying it as an advertisement or a statement informing the recipient how to report an inaccurate or misleading letter.[5] *Shapero* at 477-478.

Even truthful, non-deceptive advertisement is of such concern as to warrant regulation for the benefit of the public. In upholding the discipline of an attorney for sending a solicitation letter to the family of a person who had died in an airline crash two weeks before, the Supreme Court of New Jersey stated in the matter of *Anis,* 599 A.2d 1265 (N.J. 1992):

> Nothing in the Constitution . . . requires us to countenance solicitation that intrudes upon the victims or their families in the initial throes of their grief . . . What we are talking about here . . . is conduct that is patently offensive to

[5] Various other restrictions on targeted direct mail advertising are imposed within the Florida Bar's rule. For example, Rule 4-7.4(b)(2)(a), provides that each letter and envelope must be marked on the outside in red as an "advertisement." Rule 4-7.4(b)(1)(f) precludes the mailing of an advertisement letter when the lawyer knows or should have known of a particular victim's inability to make reasoned decisions.

> the common sensibilities of the community because it intrudes upon the private grief of victims or their families, serves only to compound their sorrow and solicits representations of them at a moment of their extreme vulnerability.

Id. at 1270-71.

Similarly, the Florida Bar has the same governmental interest:

> There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered to vulnerable prospect.
>
> The situation is therefore fraught with the possibility of undue influence, intimidation, and over-reaching. This potential for abuse inherent in direct solicitation of prospective clients justifies the thirty day restriction, particularly since lawyer advertising permitted under Rule 4-7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

The Florida Bar: Petition To Amend The Rules Regulating The Florida Bar-Advertising Issues, 571 So.2d 451, 468 (Fla. 1990).

Having established that the thirty day ban furthers a substantial governmental interest, the next inquiry is whether it is "narrowly tailored to achieve the desired objective. Plaintiff argues that a thirty-day ban is, in effect, an absolute ban since it will deprive accident victims of information at a time when it is most useful to them. Plaintiff argues that a thirty day ban travels farther than is necessary to protect vulnerable potential clients from the exertion of undue influence by the soliciting lawyer. As stated in *Shapero*, a letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded.

Shapero, however, cannot be read to preclude the implementation of a reasonable time restriction on direct-mail targeted advertising. All that *Shapero* provides is that a state may not absolutely ban such advertisements. A total ban is unlawful under *Shapero*. A thirty-day ban is not a total ban, it is a partial ban, which Shapero does not make unlawful. Discretion is vested in state bar associations to fashion restrictions sufficient to control the possibility of abuses or mistakes by the advertising lawyer. Although no mention is made of time restrictions, the opinion in *Shapero* suggests the possibility of other regulations such as requiring the lawyer to file any solicitation with a state agency, giving the state ample opportunity to supervise mailings and penalize actual abuses. *Shapero* at 476. In *In Re: R.M.J.*, 455 U.S. 191 (1982), Justice Powell, writing for the majority, states:

> Truthful advertising relating to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggest that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the states may impose appropriate restrictions . . . Even when a communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served."

Id. at 203.

Although the Supreme Court has ruled that the First Amendment protects lawyer advertising and that states may not ban targeted direct-mail advertising, the Court has nonetheless recognized the considerable latitude accorded to the states in the context of state regulation of professional standards for attorneys, as long as the regulations are reasonable. "Our cases have repeatedly stated that government restrictions upon commercial speech may be no more broad or no more expansive than 'necessary' to serve its substantial interests. (citations omitted). *Board of Trustees v. Fox*, 492 U.S. 469, 476 (1989).

The narrowly tailored standard does not require that there be " 'no conceivable alternative'. Rather, the Court requires 'only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interest." *Board of Trustees v. Fox*, 492 U.S. at 478 quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). "And we have been to loathe to second-guess the Government's judgment to that effect." *Board of Trustees v. Fox* at 478. Quoting *Shapero*, the Court in *Fox*

noted that almost all of the restrictions determined to be violative of the First Amendment have been "substantially excessive, disregarding 'far less restrictive and more precise means' ". *Fox* at 469. The Supreme Court states that in its decisions upholding the regulation of commercial speech, "it [is] 'up to the [states] to decide that point, so long as its judgment was reasonable." *Fox* at 479. More particularly, the Court in *Fox* stated:

> What our decision require [sic] is a 'fit' between the [states] ends and the means chosen to accomplish those ends' . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served . . . that employs not necessarily the least restrictive means but, as we have put in the other context . . . a means narrowly tailored to achieve the desired objective. **Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.** (emphasis supplied)

Board of Trustees v. Fox at 480.

Although the state bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit required. *Zauderer,* 471 U.S. at 647. *Fox* further recognizes the difficulty of establishing at which point state bar restrictions on lawyer advertising are sufficiently narrowly tailored to comply with First Amendment requirements, ultimately recognizing that regulatory authorities must be vested with "needed leeway" in the commercial

speech field which is "traditionally subject to governmental regulation". *Board of Trustees v. Fox,* at 481, quoting *Ohralik v. Ohio State Bar Association, supra,* 436 U.S. at 455-456.

Although the Florida Bar's Petition to amend the rules regulating lawyer advertising does not specifically tie the thirty-day time period to a perceived time within which the dissipation of the desensitized state of the accident victim takes place, the Supreme Court has never held a state "to the burden of demonstrating empirically the objective effects on the regulations at issue. *See Munro v. Socialist Worker's Party,* 479 U.S. 189, 195 (1986). In *Munro* the Supreme Court considered a challenge to a state's provision precluding the solicitation of votes within 100 feet of the entrance to a polling place as violative of the First Amendment. Although the issue was considered within the context of political expression rather than commercial speech, the Court's analysis is helpful in resolving the issue at bar. The Court did not require proof that the boundary be perfectly tailored to deal with voter intimidation and election fraud. Rather, the Court stated that the legislature, in that instance, "should be permitted to respond to potential deficiencies . . . with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-196.

The constitutionality of a time restriction on targeted direct-mail advertising in this case is an issue of first impression. However, the New Jersey Supreme Court in *Anis* suggests that a reasonable time restriction would withstand scrutiny in that state, stating:

> Would a truthful solicitation letter sent fifteen or thirty days after a tragic loss reach people when they are no longer emotionally weak or vulnerable? We cannot say with certainty since our assumptions in such cases are largely untested . . . hence, we attempt no permanent bright-line rule in this opinion. We hereby refer the issue to our committee on attorney advertising to conduct the type of informational hearing that might best inform us how we might draw a clearer line of vulnerability. In such a hearing process, the committee might invite comments from the public or public organizations concerned with the delivery of legal services . . . pending the suggested hearing process, and in order to New Jersey attorneys reasonable interim guidance . . . we shall not impose discipline for truthful letters of solicitation sent more than two weeks after such a disaster occurs and loss becomes known.

In effect, the New Jersey Supreme Court approved a two-week ban on targeted, direct-mail advertising by members of the New Jersey Bar.

It is not within the province of the courts to determine the length of the ban on targeted direct-mail advertising by the states, so long as the time is reasonable. Therefore, the Florida Bar should be permitted discretion to fashion restrictions on advertising as permitted by *Shapero* so long as the restrictions do not significantly impinge on constitutional rights. This Court should not fashion the time restriction itself, but only review the restriction to determine whether or not it infringes upon the First Amendment.

Restrictions on commercial speech must not only be narrowly tailored to serve a significant governmental interest, but must leave open ample alternatives for communication. *United States v. Grace*, 461 U.S. 171, 177 (1983). *See also Ward v. Rock Against Racism, supra*, at 791 (1989). The Florida Bar thirty-day ban obviously leaves open the alternatives of television, radio, newspaper and yellow page advertisement in the telephone book for lawyers seeking to provide the public with knowledge about the availability of their services, without a time restriction.[6]

Clearly, the restriction at issue here is content neutral since it restricts not what the lawyer says, but the mode of communication.

Plaintiff's argument that the thirty-day rule is an unreasonable classification in violation of the equal protection clause of the United States Constitution is equally without merit. The argument is based upon plaintiff's contention that the regulation is over-inclusive or under-inclusive since it fails to distinguish between accident victims who suffer minor injuries as opposed to those who suffer major injuries and are in a more sensitized or vulnerable state. Plaintiff, however, is unable to point the Court to any authority to support its position that a regulation is unconstitutional because it is over or under inclusive. As stated in *United States R.R. Retirement Board*

---

[6] The comments to Florida Bar Rule 4-7.4 makes reference to alternative means of advertising available to lawyers including "billboards and other signs, radio, television and recorded messages the public may access by dialing a telephone number."

v. Fritz, 449 U.S. 166, 175 (1980), quoting *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1990):

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' (citation omitted) 'The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific."

The Constitution does not require states to devise regulations of this nature in such a fashion that would accommodate every conceivable circumstance.

CONCLUSION

This Court is unable to conclude that the thirty-day ban on targeted-direct mail lawyer advertising is so far afield that it escapes the boundaries of constitutional unacceptability. Accordingly, I recommend that the **Defendant's Motion For Summary Judgment (Doc. 14)** be GRANTED and that the **Plaintiff's Motion For Summary Judgment (Doc. 10)** be DENIED.

Respectfully submitted on this 5th day of August, 1992.

/s/ Charles R. Wilson
CHARLES R. WILSON
UNITED STATES
MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

G. STEWART McHENRY, and
WENT FOR IT, INC., a Florida
Corporation,

Plaintiffs,

v. CASE NO. 92-370-CIV-T-17A

THE FLORIDA BAR and SUSAN V. BLOEMENDAAL, in her official capacity as Assistant Staff Counsel of The Florida Bar, (Filed Dec. 14, 1992)

Defendants.
_____/

ORDER ON REPORT AND RECOMMENDATION

This cause came to be heard before the Honorable Charles R. Wilson, United States Magistrate Judge, upon Plaintiffs' Motion For Summary Judgment and Defendants' Cross-Motion For Summary Judgment. Judge Wilson had the authority to hear this motion pursuant to 28 U.S.C. § 636(b)(1), and Rule 72 of the Federal Rules of Civil Procedure.

After considering all documents of record and the arguments of counsel at the April 27, 1992, hearing and being otherwise fully advised on the premises, Judge Wilson recommended that Plaintiffs' Motion For Summary Judgment be denied and that Defendants' Motion For Summary Judgment be granted. Judge Wilson found that as a matter of law, Florida Bar Rule 4-7.4(b)(1)a,

which imposes a thirty-day ban on personal injury and wrongful death targeted direct mail lawyer advertising, and Rule 4-7.8, which effectively imposes the same ban on lawyer referral services in Florida, do not violate the First, Fifth, or Fourteenth Amendments of the United States Constitution.

This Court has reviewed the findings of fact set out in the Report and Recommendation. With respect to these dispositive motions, this Court must make a *de novo* determination in accordance with the rules; after review of the specific written objections by the litigants. 28 U.S.C. § 636(b)(1)C; Rule 72(b), Fed. R. Civ. P.; *United Steelworkers of Am., AFL-CIO v. New Jersey Zinc Co., Inc.*, 828 F.2d 1001, 1005 (3d Cir. 1987); *Hantz v. Shiley, Inc., a Div. of Pfizer, Inc.*, 766 F.Supp. 258 (D.N.J. 1991).

Factual and Procedural Background

This case focuses on the amendments to Florida Bar rules regulating lawyer advertising, which became effective April 1, 1991. Rule 4-7.4 prohibits direct mail adverting [sic] of legal services relating to actions for personal injury or wrongful death until more than thirty days have elapsed from the accident or disaster mentioned in the written communication. The consequence of Rule 4-7.4 is imputed to lawyer referral services through Rule 4-7.8.

This cause of action was originally brought by both G. Stewart McHenry[1] and Went For It, Inc. On October

[1] Plaintiff, G. Stewart McHenry, as a member of the Florida Bar had sent direct mail advertisements for legal services to

24, 1992, G. Stewart McHenry was disbarred by the Florida Supreme Court which caused his cause of action against the Defendants to become moot. However, this does not moot the entire case. There remains a case and controversy between the corporate Plaintiff, Went For It, Inc., and Defendants. Plaintiff, Went For It, Inc., desires to conduct business in the State of Florida as a lawyer referral service, utilizing direct mail advertising targeted at personal injury victims and their families.

Plaintiff originally filed a motion for a preliminary injunction requesting that the Court enjoin Defendants from enforcing the challenged rules. However, after counsel conferred, Plaintiff withdrew its motion for preliminary injunction, and both parties filed cross motions for summary judgment.

Standard of Review

Summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the non-moving party. *Sweat v. Miller Brewing Co.*, 708 F.2d 655 (11th Cir. 1983). " '[A]ll doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment.' " *Hayden v. First Nat'l Bank of Mount Pleasant, Texas*, 595 F.2d

---

personal injury victims in the past. He wanted to continue direct mail solicitation to personal injury victims, after the Florida Bar passed the disputed rules.

655 (5th Cir. 1979)[2], quoting *Gross v. Southern R.R. Co.*, 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The parties in the case at bar have stipulated that there are no genuine issues of material fact in this case. Upon review of the record the Court agrees that summary judgment is appropriate.

ISSUE

Whether, as a matter of law, the Florida Bar's thirty-day ban, on personal injury and wrongful death targeted direct mail lawyer advertising, violates the First, Fifth, and Fourteenth Amendments to the United States Constitution.

DISCUSSION

Justice Stevens' opinion in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), reaffirmed the court's resolve to provide First Amendment protection to attorney targeted mail advertising, stating:

> Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this court should exercise de novo review. (citation omitted). That the judgment below is by a State Supreme Court exercising

---

[2] The Eleventh Circuit adopted as precedent all case law of the Fifth Circuit prior to September 30, 1981. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

> review over the actions of its State Bar Commission does not insulate it from our review for constitutional infirmity. (citation omitted). The Commission's authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision making [sic] than is concealment of such information. (citation omitted).

Id. at 108. Furthermore, the court noted that, "A principal reason why consumers do not consult lawyers is because they do not know how to find a lawyer able to assist them with their particular problems. [Federal Trade Commission, "Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions of Truthful Advertising" (1984)]. *Id.* at 110.

A. Substantial Government Interest Test

Defendants justify the thirty day ban on targeted mail advertising by citing to comments on Rule 4-7.4, as follows:

> There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a *direct interpersonal encounter.* A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking the retainer is

> faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.
>
> The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies the thirty-day restriction, particularly since lawyer advertising permitted under rule 4-7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.
>
> . . .
>
> This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving the loss of a family member, and the abuses which experience has shown exist in this type of solicitation. (emphasis added).

The Florida Bar: Petition to Amend Rules Regulating The Florida Bar Advertising Issues, 571 So.2d 451, 468 (Fla. 1990).

The Court in *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988), established that truthful straightforward direct mail lawyer advertising is constitutionally protected commercial speech and that the state must have a substantial interest that is directly advanced by any infringement of that commercial speech. The substantial interests which Defendants allege were dealt with in *Shapero.* Defendants', and the Florida Supreme Court's, use of the words "direct interpersonal encounter" to describe targeted mail advertising

by lawyers is a strained interpretation. Justice Brennan made it clear that a letter, unlike a "badgering advocate," can be avoided merely by placing it in a drawer to be considered later, ignored or discarded. *Id.* at 476-7. The concern for potential clients feeling overwhelmed was considered by that court:

> The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.

Id. at 474. Lastly, concerns of deliberate overreaching by lawyer advertising is precluded by Rule 4-7.4(b)(1)(f) which was not challenged.[3]

The *Shapero* court found that a targeted letter conveys information about legal services in a manner that is more conducive to the reader reflecting and making an informed choice as a consumer. *Id.* at 476. Furthermore, the court stated that:

> [T]he First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban

---

[3] Rule 4-7.4(b)(1)(f) provides in pertinent part:

(b) Written communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on behalf of himself, his firm, his partner, an associate or any other lawyer affiliated with him or his firm, a written communication to a prospective client for the purpose of obtaining professional employment of: . . .

> (f) The lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

> a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

Id. at 473-4. For these reasons, this Court has determined that the concerns expressed above by Defendants do not justify a prophylactic rule prohibiting targeted direct mail advertising to personal injury and wrongful death victims for thirty days.

Defendants argue that the thirty day period of prohibited targeted advertising does not constitute a ban. They assert that *Peel* gave authority for such a rule, since the proscription is merely a limited regulation. (Defendants' Cross-Motion for Summary Judgment, page 6, citing to *Peel*, at 110, n. 17). The footnote which Defendants cite as authority for the thirty day ban was referring to disclosure requirements and screening of advertisements to "ensure that the information is presented in a non-misleading [sic] manner." *Peel*, at 110-111. The fault in Defendants' logic is that waiting thirty days will not affect whether the targeted letter is misleading any more than if the ban were not in effect. Therefore the limitation is not narrowly tailored in a manner that advances the substantial government interest which Defendants assert.

B. Time, Place and Manner Restriction

Defendants further argue that the thirty day ban is a valid time, place, and manner restriction by equating personal injury and wrongful death targeted lawyer advertising to prohibited political and ideological speech. They argued that direct mail advertising "is no less an intrusion on personal privacy and tranquility and no less

offensive than the election signs in *Taxpayers for Vincent*,[4] the sound trucks in *Kovacs*,[5] or the picketing in *Frisby*."[6]

Defendants' strained analogies are not persuasive, primarily because they are all examples where the parties, subjected to such speech, could not "avoid further bombardment of [their] sensibilities simply by averting [their] eyes." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465, n. 25, 98 S.Ct. 1925, 56 L.Ed.2d 444 (1978) [quoting *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)]. This is not the case with targeted lawyer letters which are clearly marked in red as "advertisement" (*See*, Rule 4-7.4(b)(1)f.(2)a.) and can be discarded by the recipient without any fear of legal recourse or filed away until a consumer desires to read the letter.

Furthermore, this is not a valid time, place, and manner restriction because it is the content of the advertisement which is banned for thirty days. In *Simon & Schuster, Inc. v. New York Crime Victims Board*, the court held: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," 112 S.Ct. 501, 508, 116 L.Ed.2d 476, 60 U.S.L.W. 4029 (1991)

---

[4] *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), (prohibiting the posting of election signs on public property).

[5] *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), (prohibiting the use on public streets of sound trucks emitting loud noises).

[6] *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), (prohibited anti-abortion picketing outside of residence of a doctor accused of performing abortions).

[quoting *Regan v. Time Inc.*, 468 U.S. 641, 648-49, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984)]. Although the case at bar does not receive the heightened protection of political speech, the restrictions placed on direct mail advertising must be narrowly tailored in a manner that advances the substantial government interest of protecting recipients from misleading advertisements. The same family members in a wrongful death case, which the thirty day ban alleges to protect, may be contacted the next day by a probate attorney. Thus, it is the content which Defendants wish to restrict for thirty days, and this cannot be permitted under the auspices of a time, place and manner restriction.

Defendants argue that bar rules "leave open ample alternative channels for communication of the information." [Defendants' Cross Motion for Summary Judgment, page 11; citing to *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)]. However, this Court need not address that issue, because the thirty day ban on targeted lawyer advertising is not content neutral and cannot be upheld as a valid time, place and manner restriction.

C. In re Anis

Defendants next assert that the New Jersey Supreme Court addressed the issue before this court in *In re Anis*, 599 A.2d 1265, 126 N.J. 448 (N.J.1992). That case involved a solicitation letter sent by Mr. Anis to the family of a victim of the disaster on December 21, 1988, involving Pan American Flight 103 over Lockerbie, Scotland. *Id.* at 1267. However, this case is distinguishable in that Mr.

Anis engaged in false and misleading advertising. He failed to indicate a range of his fees, misrepresented what other lawyers would charge, and misrepresented his professional experience in litigating aircraft accidents. *Id.* at 1271-72. Furthermore, he admitted to sending the letter without knowing whether the victim's body had been identified, which is a violation of a New Jersey rule similar to Rule 4-7.4(b)(1)(f). *Id.* at 1270. The New Jersey Supreme Court decided "not [to] impose discipline for truthful letters of solicitation sent more than two weeks after such a disaster occurs and [the] loss becomes known." *Id.* at 1271. The New Jersey Supreme Court used this as interim guidance pending a hearing process by their bar. *Id.* at 1271. The New Jersey Court explained:

> We realize that there may be other cases in which it will be more difficult to draw the line of ethical propriety. Would a truthful solicitation letter sent fifteen or thirty days after a tragic loss reach people when they are no longer emotionally weak or vulnerable? We cannot say with certainty, since our assumptions in such cases are largely untested. It may be that there are degrees of loss or suffering. Common sense tells us that the mildly-injured survivors of an overturned-bus incident might be less vulnerable than the Lockerbie families. Hence, we attempt no permanent brightline [sic] rule in this opinion.

Id. at 1271. None of the foregoing egregious conduct is present in this case and in contradistinction the Florida Supreme Court enacted such a bright-line. As a result, this Court does not find *In re Anis* to be persuasive

authority in upholding the Florida Bar's thirty day ban on target direct mail advertising.

Conclusion

The challenged rules substantially impair and impede the availability of truthful and relevant information which can make a positive contribution to consumers in need of such legal services. This Court holds that as a matter of law, the Florida Bar's thirty-day ban on personal injury and wrongful death targeted direct mail lawyer advertising violates the First, Fifth, and Fourteenth Amendments to the United States Constitution. Accordingly, it is

ORDERED that the Report and Recommendation be rejected by this Court; Plaintiff's Motion for Summary Judgment be **granted**; Defendants' Motion for Summary Judgment be **denied;** and the Clerk of the Court be **directed** to enter judgment for Plaintiff in accord with this order.

DONE and ORDERED in chambers, in Tampa, Florida on this 14th day of December, 1992.

/s/ Elizbeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:
All parties and counsel of record.

G. Stewart McHENRY, Went For It, Inc., a Florida Corporation, John T. Blakely, Plaintiffs-Appellees,

v.

THE FLORIDA BAR, Susan V. Bloemendaal, Defendants-Appellants.

No. 93-2069.

United States Court of Appeals, Eleventh Circuit.

May 10, 1994.

Lawyer and lawyer referral service brought suit challenging constitutional validity of Florida Bar rule prohibiting lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of accident. The United States District Court for the Middle District of Florida, No. 92-370-CIV-T-17A, Elizabeth A. Kovachevich, J., 808 F.Supp. 1543, ruled that 30-day ban on such advertising violated the First Amendment. Florida Bar appealed. The Court of Appeals, Black, Circuit Judge, held that: (1) rule could not be justified by state's interest in protecting persons traumatized by recent injury, or by state's interest in protecting personal privacy and tranquility of persons affected by personal injury or death, and (2) rule was not a valid time, place, and manner restriction, since it was not content-neutral either on its face or as applied.

Affirmed.

Appeal from the United States District Court for the Middle District of Florida.

Before BLACK, Circuit Judge, DYER, Senior Circuit Judge, and ALAIMO*, Senior District Judge.

BLACK, Circuit Judge:

The question in this appeal is whether The Florida Bar's thirty-day ban on direct mail lawyer advertising soliciting personal injury and wrongful death clients violates commercial speech protections afforded attorney advertising under the First Amendment. The district court ruled that it does. We affirm.

I.

Subject to approval by the Florida Supreme Court, The Florida Bar (Bar) promulgates rules that regulate the manner in which Florida lawyers may contact prospective clients for the purpose of obtaining professional employment. *See* R. Regulating Fla. Bar 4-7.1 to -7.7 (Rules). The Rules generally prohibit lawyers from in-person, telephone, telegraph, or facsimile solicitation of prospective clients with whom the lawyer has no family or prior professional relationship. *Id.* at 4-7.4(a).[1] The

---

* Honorable Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.

[1] Rule 4-7.4, Direct Contact with Prospective Clients, reads in pertinent part:

> **(a) Solicitation.** A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. . . . The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by

Rules permit direct mail solicitation of prospective clients except under certain conditions, *id.* at 4-7.4(b)(1), and provide specific requirements that must be followed when lawyers solicit clients through the mail, *id.* at 4-7.4(b)(2). Client solicitation rules apply indirectly to lawyer referral services through the Bar's prohibition on lawyers accepting referrals from services that contact potential clients in a manner that would violate the Rules if the contact was made by a lawyer. *Id.* at 4-7.8(a)(1).[2]

Appellee McHenry, a member of The Florida Bar when he filed this suit, regularly solicited personal injury and wrongful death clients via direct mail before being disbarred for acts unrelated to the facts of this case.[3] New rules regarding client solicitation by mail took effect in January 1991,[4]

---

other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule.

[2] Rule 4-7.8, Lawyer Referral Services, reads in pertinent part:

> **(a) When Lawyers May Accept Referrals.** A lawyer shall not accept referrals from a lawyer referral service unless the service:
>
> (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.

[3] *The Florida Bar v. McHenry*, 605 So.2d 459 (Fla.1992).

[4] *.The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar – Advertising Issues*, 571 So.2d 451, 460 (Fla.1990) (*Petition – Advertising Issues*). The Bar petitioned the Florida Supreme Court to amend the rules regulating attorney advertising. The Court approved the Bar's proposed rules with certain modifications. *Id.*

including a new rule that prohibits lawyers from using direct mail to solicit personal injury or wrongful death clients "unless the accident or disaster [for which representation is sought] occurred more than 30 days prior to the mailing of the communication." *Id.* at 4-7.4(b)(1)(A).[5] McHenry and Went For It, Inc. (WFI), a lawyer referral service owned by McHenry, sued the Bar to enjoin enforcement of Rule 4-7.4(b)(1)(A), asserting that, but for its prohibition, they would send such letters within thirty days of an accident or disaster.[6]

---

[5] The Bar originally proposed to the Florida Supreme Court a total prohibition of all direct mail advertising target to potential personal injury or wrongful death clients. *Petition – Advertising Issues*, 571 So.2d at 459. The Court disapproved the proposal, acknowledging that United States Supreme Court precedent prohibited such a ban. *Id.* The Florida Supreme Court held, however, that it could constitutionally "restrict [such advertising] by directing that any mail advertising pertaining to personal injury and wrongful death claims shall be mailed no earlier than thirty days after the incident which precipitated the claim." *Id.* The Court modified the Bar's proposal and instituted the thirty-day ban. *Id.*

[6] Appellees do not challenge any other Bar rules regarding client solicitation by mail. We presume, without deciding the constitutional validity of any other rules, that the letters they propose to send will comply with all other regulations established in Rule 4-7.4(b), including:

> (1) no letters will be sent to persons known to be represented by another attorney in the matter;
>
> (2) no letters will be sent to persons who have made it known to the sender that they do not want to receive such communication;
>
> (3) no letters will subject the recipient to coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;

McHenry's suit became moot when he was disbarred. WFI continued as a plaintiff because it alleged injury in fact from the indirect application of the thirty-day ban to

---

(4) no letters will contain false, deceptive, or unfair statements or claims;

(5) no letters will be sent if the sender knows or reasonably should know that the physical, emotional or mental state of the recipient makes it unlikely that the recipient would exercise reasonable judgment in employing a lawyer;

(6) the face of every envelope will be marked in red with the word "advertisement," and every page of any letter sent will be similarly marked;

(7) a copy of the letter and envelope will be sent to the designated committee of the Bar and retained by the sender as required;

(8) letters will be sent by regular U.S. mail only, not by any other means;

(9) letters will contain no reference suggesting that the letter has been approved by the Bar;

(10) the appropriate statement of qualifications will accompany each letter sent;

(11) the first sentence of the letter will be "If you have already retained a lawyer for this matter, please disregard this letter";

(12) the letter will look like a letter, not a pleading or other legal document;

(13) if the matter will be handled by a lawyer other than the lawyer sending the letter, a statement to that effect will be included;

(14) the letter will disclose how the sender obtained information about the recipient's involvement in the accident or disaster that prompted the letter; and

(15) the nature of the recipient's legal problem will not be revealed on the outside of the envelope.

it through Rule 4-7.8(a)(1).[7] WFI maintains that the thirty-day ban is an unconstitutional restriction on commercial speech in violation of the First Amendment. The Bar submits that the ban serves substantial governmental interests that justify the restriction on speech. In addition, the Bar maintains that the ban is a content-neutral time, place, and manner restriction on speech.

All parties agreed that there were no genuine issues of material fact for trial and submitted cross motions for summary judgment. The district court referred the case to a magistrate judge, who found that the thirty-day ban on direct mail solicitation of personal injury and wrongful death clients withstood constitutional scrutiny and recommended that summary judgment be granted in favor of the Bar. On review of the magistrate judge's report and recommendation, the district court disagreed. It held that the ban violated constitutional protections of free speech

---

[7] The Washington Legal Foundation and The Allied Educational Foundation submitted an *amici curiae* brief to this Court asserting that WFI lacked standing independent of McHenry to maintain this suit in the district court. The Bar and WFI both maintain that jurisdiction is proper despite the mootness of McHenry's claim. We are persuaded that WFI alone has standing to bring this claim. *See Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190, 1204 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238, 114 L.Ed.2d 479 (1991). In addition, on limited remand from this Court, the district court granted WFI's unopposed motion to add Appellee Blakely, a member of The Florida Bar, as a party Plaintiff. Blakely asserts that, but for Rule 4-7.4(b)(1)(A), he would engage in direct mail solicitation of clients during the thirty-day period. Thus, even if WFI lacked standing, Appellee Blakely has standing to challenge the thirty-day ban on direct mail advertising.

and granted summary judgment in favor of WFI. 808 F.Supp. 1543.

II.

In 1977, the Supreme Court first ruled that states could not prohibit certain truthful advertising by lawyers concerning the availability and price of legal services. *Bates v. State Bar,* 433 U.S. 350, 384, 97 S.Ct. 2691, 2709, 53 L.Ed.2d 810 (1977). Subsequently, the Supreme Court has held that states may ban completely a lawyer's in-person solicitation of clients to prevent the potential for overreaching, undue influence, and intimidation on members of the public that is present when "a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 464-68, 98 S.Ct. 1912, 1923-25, 56 L.Ed.2d 444 (1978). States may not, however, ban outright the use of direct mail by attorneys to solicit clients known to be in need of legal services. *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 473, 108 S.Ct. 1916, 1921-22, 100 L.Ed.2d 475 (1988).

Today, "[l]awyer advertising is in the category of constitutionally protected commercial speech." *Id.* at 472, 108 S.Ct. at 1921. As such, lawyer advertising "that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 638, 105 S.Ct. 2265, 2275, 85 L.Ed.2d 652 (1985). In further defining the connection between the means chosen to advance the

government interest in regulating commercial speech and the interest itself, the Supreme Court has explained that the means must simply fit:

> a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

Board of Trustees v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989) (citation and internal quotation omitted). Because there is no suggestion that Appellee's proposed direct mail solicitations will be false or deceptive, the Bar must demonstrate that its thirty-day ban serves a substantial government interest and is narrowly tailored to achieve that interest.

The Bar submits that two substantial governmental interests are served by the thirty-day ban: (1) protecting persons traumatized by recent injury to themselves or members of their family who are likely to be in a state of mind which inhibits objective evaluation of a personalized solicitation from a lawyer, and (2) protecting the personal privacy and tranquility of persons who were themselves, or whose loved ones were, recent victims of personal injury or death. We conclude that neither of these asserted interests justifies a thirty-day ban on otherwise constitutionally protected direct mail advertising by attorneys.

A.

In *Shapero*, the Supreme Court rejected the assertion that a state could ban truthful, direct mail solicitation of persons overwhelmed by legal troubles because their capacity to exercise good judgment in selecting a lawyer was assertedly impaired. 486 U.S. at 474, 108 S.Ct. at 1922. In that case, the Kentucky Bar Association denied approval of a truthful letter that an attorney proposed to send to potential clients he learned had a foreclosure suit filed against them. *Id.* at 469, 108 S.Ct. at 1919. The court first noted that Kentucky could not constitutionally prohibit the attorney from sending a nearly identical letter, suggesting his services if the need should ever arise, to an at-large audience *not* known to need representation. *Id.* at 473, 108 S.Ct. at 1921. Turning to the targeted nature of the solicitation, the Court explained that "the First Amendment does not permit a ban on certain speech merely because it is more efficient." *Id.* at 473, 108 S.Ct. at 1922.

The Court further recognized that persons overwhelmed to the degree that their capacity for good judgment is impaired would have the same impairment whether evaluating an attorney's newspaper advertisement, a general solicitation letter, or a targeted solicitation letter. *Id.* The Court thus concluded that "[t]he relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Id.* Targeted direct mail advertising, the mode of communication in *Shapero* and in this case, " 'poses much less risk of overreaching or undue influence' than

does in-person solicitation." *Id.* (quoting *Zauderer*, 471 U.S. at 642, 105 S.Ct. at 2277).

As the Court pointed out, a letter does not present " 'the coercive force of the personal presence of a trained advocate' or the 'pressure on the potential client for an immediate yes-or-no answer to the offer of representation.' " *Id.* Letter recipients can merely avert their eyes to avoid bombardment of their sensibilities, put the letter in a drawer to consider or ignore later, or simply throw the letter away.[8] *Id.* 486 U.S. at 475-76, 108 S.Ct. at 1923. Given the greatly reduced potential for coercion presented by a letter, the Court held that Kentucky's total ban on direct mail advertising was an unconstitutional restriction on commercial speech. *Id.*

While all the potential clients targeted in *Shapero* were assertedly unable to exercise unimpaired judgment due to the overwhelming nature of pending foreclosure litigation, some of the potential clients in this case are assertedly overwhelmed by different circumstances, such as injury to themselves or family members, or even the loss of a loved one.[9] The cause of the potential client's

---

[8] These recipient responses become even more likely, and the potential for undue influence is even further reduced, when the letter bears the inscription "advertising material" in red on the envelope and on each internal page, as required in Florida. *See* R. Regulating Fla. Bar 4-7.4(b)(2)(A).

[9] We note that, although all the potential clients in *Shapero* faced legal difficulties of the same magnitude (a foreclosure suit), some of the potential clients targeted by Appellees in this case will suffer from relatively minor injuries, while others no doubt will have injuries that are more severe. Nevertheless, the Bar rule applies equally to solicitations within thirty-days of a

assertedly impaired judgment, however, is inconsequential to our inquiry under *Shapero*. The relevant inquiry is the *mode* of communication. *Id.* at 474, 108 S.Ct. at 1922. A letter, especially a letter marked "advertising material" in red, possesses limited potential for overreaching, whether the potential client is overwhelmed by pending litigation, personal injury, or grief. *See id.*

In addition, the Bar notes that, while the ban held unconstitutional in *Shapero* was total, the ban under Rule 4-7.4(b)(1)(A) lasts for only thirty days. We find nothing in *Shapero* to suggest that states may impose such a moratorium on direct mail solicitation. The Bar maintains, nonetheless, that its thirty-day ban is justified by the assertedly heightened sensitivities of some potential recipients in the immediate aftermath of a tragedy.[10] Even if *Shapero* could be read to support restrictions based upon the letter recipient's sensitivity, we are not persuaded that the heightened sensitivity of some potential recipients justifies a prophylactic rule such as this.[11] This

---

simple slip and fall or of accidents that result in severe injuries or fatalities.

[10] The potential clients in *Shapero* were all persons against whom a foreclosure suit had been filed. In Kentucky, a defendant must file an answer within twenty days after service of a summons. Ky.R.Civ.P. 12.01. Given this time constraint, Shapero's letters would have needed to reach the intended recipients quickly, certainly within twenty days, or the letters' effectiveness would likely be lost entirely. Thus, in *Shapero*, the Court approved direct mail solicitations that would be sent to recipients shortly after the event that triggered the potential need for legal representation.

[11] We note that Bar Rule 4-7.4(b)(1)(F) also appears designed to serve the state's interest in protecting potential

is especially true considering that the period immediately following an accident or disaster may well be the time when the need for legal advice is most pressing.[12] "[T]he State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable." *Shapero*, 486 U.S. at 473, 108 S.Ct. at 1922. We conclude, therefore, that the Bar's first asserted substantial interest fails, under *Shapero*, to justify the thirty-day ban on attorney direct mail solicitation of potential personal injury and wrongful death clients.

---

letter recipients with heightened sensitivities. That Rule prohibits direct mail solicitation of potential clients when "the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer." R. 4-7.4(b)(1)(F). This case does not present a challenge to Rule 4-7.4(b)(1)(F) and we make no comment concerning its legality. We mention it only to demonstrate the difference between a prophylactic rule like the thirty-day ban and a more narrowly tailored approach.

[12] Justice Shaw of the Florida Supreme Court noted that,

> This ban will effectively deprive many accident victims of information concerning the availability of professional legal assistance precisely when they need it most – during the initial period following a serious accident when they are confronted with an unintelligible legal tangle and demands to waive or compromise their rights. It is during this time that informed decisionmaking is crucial.

Petition – Advertising Issues, 571 So.2d at 474 (Shaw, C.J., concurring in part and dissenting in part).

B.

The Bar also asserts that the thirty-day ban serves a substantial state interest by protecting the personal privacy and tranquility of persons who were themselves, or whose loved ones were, recent victims of personal injury or death. We recognize that the intrusion of Appellee's letters upon grief-stricken recipients may be offensive. We also appreciate the Bar's attempt to protect an individual's personal privacy, and to preserve the integrity of the legal profession, by eliminating offensive solicitations such as these.[13] We are persuaded, however, that under Supreme Court precedent this asserted interest cannot justify a thirty-day ban on certain targeted solicitations and cannot overcome the protections afforded commercial speech under the First Amendment.

---

[13] The Supreme Court addressed concerns about offensive lawyer advertising in *Zauderer*, a case that involved truthful newspaper advertising for potential Dalkon Shield litigation clients. There, the Supreme Court noted that states acting through their bar associations do have a substantial interest in ensuring that "attorneys behave with dignity and decorum in the courtroom." 471 U.S. at 647, 105 S.Ct. at 2280. Nonetheless, the Court was uncertain that a state's "desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of [attorneys'] First Amendment rights." *Id.* The Court explained that, even if that state interest could be considered substantial, it was "unpersuaded that the undignified behavior would tend to recur so often as to warrant a prophylactic rule" barring all solicitation of legal employment. *Id.* Moreover, "the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it." *Id.* (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675 (1977)).

The Bar maintains that Appellee's targeted letters will invade the recipients' personal privacy and disturb the tranquility of their homes. As the Supreme Court noted in *Shapero*, "a targeted letter [does not] invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." 486 U.S. at 476, 108 S.Ct. at 1923. Similarly, the invasion of the potential client's privacy in this case occurs when the lawyer learns of the accident or tragedy with which the potential client is involved. In many cases, this invasion of privacy will involve no more than reading the newspaper.

Nonetheless, the Bar urges that we focus our inquiry on the fact that the solicitation letters in this case will enter into and intrude upon the tranquility of a potential client's home, a place traditionally afforded great protection. *See Frisby v. Schultz*, 487 U.S. 474, 483, 108 S.Ct. 2495, 2502, 101 L.Ed.2d 420 (1988) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."). It equates the "invasion" created by the client solicitation letters in this case with that of the anti-abortion protesters banned from a doctor's front lawn in *Frisby*, and with the unavoidable loud noise blasted at homes from sound trucks in *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). We decline to place the invasion of an envelope stamped "advertisng material" in red in such a category. *See Shapero*, 486 U.S. at 476, 108 S.Ct. at 1923. We also note that virtually all direct mail advertising, and most advertising of other

varieties, "invades" the tranquility of the recipients' home, yet is protected by the First Amendment. We conclude, therefore, that the Bar's thirty-day ban on attorneys' direct mail solicitation of potential personal injury and wrongful death clients is not justified by its asserted interest in protecting the recipients' privacy or the tranquility of their homes.

III.

The Bar alternatively maintains that we should uphold the thirty-day ban on direct mail solicitation of personal injury and wrongful death clients as a reasonable time, place, and manner restriction on speech. States may place restrictions on the time, place, and manner of constitutionally protected communication if they do so: (1) without regard to the content of the communication, (2) in a manner narrowly tailored to serve a significant governmental interest, and (3) leaving open alternative channels for communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). We conclude that the Bar's Rule fails to meet the first element of the test described in *Clark*.

On its face the thirty-day Rule is unambiguously content-based. It applies only to letters that "concern[] an action for personal injury or wrongful death." R. 4-7.4(b)(1)(A). It is, then, the subject matter of the letter, a solicitation for a certain type of representation, that triggers application of the Rule.

The Bar nevertheless maintains that the Rule has nothing to do with the content of the proposed letter.

Rather, it asserts that application of the Rule is based upon the nature of the intended recipient as an accident victim or family member. Indeed, the Bar claims that it does not need to review the content of a letter in order to determine whether or not the rule is applicable – it need only determine the source of the list of recipients of the letter. As the district court noted, however, letters soliciting the same potential client under identical circumstances for probate representation or any other purpose are permitted. The source of the list of recipients for the probate attorney's letter could be identical to that of the wrongful death attorney's letter, yet only the wrongful death solicitation would be banned under the Rule.

We conclude that the Bar would necessarily need to examine the content of the letter to determine whether the Rule applied to the attorney in question. Application of the rule, therefore, depends on the content of the letter. The Bar's assertion that the Rule is not designed to suppress the content of the letter is unavailing. The Rule is not content-neutral, either on its face or as applied. Accordingly, it is not a reasonable time, place, and manner restriction on speech.

IV.

Justice Powell predicted in *Bates* that recognizing First Amendment protections for attorney advertising would "effect profound changes in the practice of law, viewed for centuries as a learned profession." 433 U.S. at 389, 97 S.Ct. at 2712 (Powell, J., concurring in part and dissenting in part). That prediction has proven true. Unfortunately, the resulting changes have not necessarily

been for the better. We are disturbed that *Bates* and its progeny require the decision we reach today. We are forced to recognize that there are members of our profession who would mail solicitation letters to persons in grief, and we find The Florida Bar's attempt to regulate such intrusions entirely understandable. Although the Bar may not formally restrict such behavior, an attorney's conscience, self-respect, and respect for the profession should dictate self-restraint in this area. To preserve the law as a learned profession demands as much.

For the foregoing reasons, the district court's grant of summary judgment in favor of Went For It, Inc. is

AFFIRMED.

---

(2)

Supreme Court, U.S.
FILED
AUG 30 1994
OFFICE OF THE CLERK

No. 94-226

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
2441 Southwest 28th Avenue
Fort Lauderdale, Florida 33312
(305) 767-8909

BEVERLY A. POHL
Suite 200
350 Southeast Second Street
Fort Lauderdale, Florida 33301
(305) 767-8909

Attorneys for Respondents

BEST AVAILABLE COPY

5604
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

17 pp

QUESTIONS PRESENTED

I. Whether a state bar association rule which prohibits truthful, non-misleading targeted direct mail lawyer advertising for 30 days after a personal injury or accident conflicts with *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)?

II. Whether a state bar association rule which prohibits truthful, non-misleading targeted direct mail personal injury lawyer advertising for 30 days after a personal injury or accident is content-based, and therefore an invalid time, place, and manner restriction on protected commercial speech?

LIST OF PARTIES

G. Stewart McHenry, Plaintiff below and named by Petitioner as a Respondent in this Court, was not a party to the proceedings in the Eleventh Circuit and should not be named in this proceeding. Rule 12.4, R.S.Ct. There is no continuing case or controversy between The Florida Bar and Mr. McHenry; his claims against The Florida Bar became moot upon his disbarment during the district court proceedings. (*See* Petition for Writ of Certiorari, p. 5, and App. 19-20, 34-35).

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Decisions Below	1
Statement of the Case	2
Summary of the Argument	4
Reasons for Denying the Writ	5
I. The decision below is consistent with, and was mandated by, this Court's decision in *Shapero v. Kentucky Bar Association.*	5
II. A 30-day ban on truthful, non-misleading targeted direct mail personal injury lawyer advertising is content-based, and is not a permissible time, place, and manner regulation of speech.	6
III. The decision below applies commercial speech principles in a way which does not conflict with permissible restrictions on speech in selected public institutions.	8

Page

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989) 8

City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 8

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 6, 7

Edenfield v. Fane, 113 S. Ct. 1792 (1993) 8

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) .....i, 2, 3, 4, 5, 6, 9, 10

United States Constitution Cited:

First Amendment 8

Rules Cited:

Florida Bar:

Rule 4-1.6 9

Rule 4-3.5 9

Page

Rule 4-3.6 9

Rule 4-3.7 9

Rule 4-4.2 9

Rule 4-7.1 9

Rule 4-7.2 9

Rule 4-7.4 9

Rule 4-7.4(b)(1)(a) 7

Rule 4-7.6 9

Rule 4-7.7 9

Supreme Court Rule 10 5

Supreme Court Rule 12.4 ii

No. 94-226

In the

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC. and JOHN T. BLAKELY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DECISIONS BELOW

The district court and court of appeals decisions in this case are cited incorrectly in the Petition for Writ of Certiorari, at page 1. The decision below is reported at 21 F.3d 1038 (11th Cir. 1994). The district court decision is reported at 808 F. Supp. 1543 (M.D. Fla. 1992).

STATEMENT OF THE CASE

Petitioner's Statement of the Case fails to present an accurate description of the proceedings below. Therefore Respondents submit this summary of the district court and Eleventh Circuit proceedings.

The Florida Bar devotes the first two pages of its Statement of the Case to a survey it conducted in 1987, five years prior to the initiation of this action in the district court. That survey played no substantive role in this case.

The Florida Bar survey, in its entirety, is not part of the record in this case. Only a "Summary of the Record" of the survey was before the district court, and most of that summary is irrelevant to the issues in this case. Only two sections of the summary pertain to direct mail advertising — a 1987 attitude and opinion poll (Magid's "two telephone surveys of Florida adults"), and a compilation of anecdotal personal opinions on lawyer advertising. Both submissions lack any indicia of scientific reliability and provided no constitutional guidance to the courts below. Neither the district court nor the court of appeals commented on either "survey." The Petition's reliance on those unpublished materials distorts The Bar's description of this case.

Petitioner's presentation of the procedural history of this case also misleads by featuring the report and recommendation of the Magistrate Judge on the parties' cross-motions for summary judgment (Pet. at 5, Pet. App.1-17; *see also*, Pet. at 10). The Magistrate's recommendations were rejected by the district court and by the Eleventh Circuit. (Pet. App. 22-29; 30-46).

The district court found that *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), which upheld the constitutionality of targeted direct mail lawyer advertising, was controlling and dispositive:

"The substantial interests which Defendants allege were dealt with in *Shapero*." (Pet. App. 23). The district court also rejected The Florida Bar's argument that the challenged Rules were sustainable as time, place, and manner regulations, finding that the Rules were not "content neutral." (Pet. App. 26-27). The court granted summary judgment to the challengers:

> The challenged rules substantially impair and impede the availability of truthful and relevant information which can make a positive contribution to consumers in need of legal services. This Court holds that as a matter of law, the Florida Bar's thirty-day ban on personal injury and wrongful death targeted direct mail lawyer advertising violates the First, Fifth, and Fourteenth Amendments to the United States Constitution.

(Pet. App. 29).

The Eleventh Circuit affirmed, holding that neither of The Bar's asserted state interests (protecting traumatized persons who are unable to make an objective evaluation of a personalized solicitation from a lawyer; protecting personal privacy of injured persons and their families) justified a 30-day ban on "otherwise constitutionally protected direct mail advertising by attorneys." (Pet. App. 37). Relying on *Shapero*'s guidance that "[t]he relevant inquiry is the *mode* of communication," (Pet. App. 40, *citing Shapero* at 474, 108 S. Ct. at 1922) (emphasis in original), the Eleventh Circuit found that targeted direct mail advertising "possesses limited potential for overreaching. . . ." The court below also found that *Shapero* had considered and rejected The Bar's argument that a direct mail letter impermissibly invades the privacy of the recipient. (Pet. App. 43-44). Finally, like the district court, the Eleventh Circuit found that the challenged rules were

"unambiguously content-based," and thus were not subject to a time, place, and manner analysis. (Pet. App. 44-45).

Respondents have no objection to the remainder of Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

Certiorari should be denied because the decision below is consistent with this Court's decision in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). *Shapero* upheld the constitutionality of truthful, non-misleading targeted direct mail lawyer advertising. The challenged rules of The Florida Bar, which impose a 30-day ban on such advertising, violate lawyers' First Amendment commercial speech rights as defined in *Shapero*. Petitioner's complete failure to distinguish or even to address *Shapero* is surprising and revealing. *Shapero* shuts the door on The Bar's argument.[1]

Moreover, the challenged rules are content-based restrictions on speech, and as such may not be upheld as reasonable time, place, and manner regulations, even if *Shapero* were not controlling.

Petitioner's invitation to the Court to use the narrow issues in this case as a springboard to "revisit the entire question of states' authority to regulate attorney solicitation" (Pet. at 10) is unwise and unwarranted. The Bar's suggestion that targeted direct mail lawyer advertising somehow jeopardizes "a stable democracy," *id.*, elevates hyperbole over principled reasons for review.

---

1. Petitioner's only reference to *Shapero v. Kentucky Bar Ass'n*, (Pet. at 7), is to "the comments of Justices O'Conner [sic], Rehnquist and Scalia." Those comments were contained in a *dissenting* opinion, a fact omitted from Petitioner's reference.

In the absence of any conflict with this Court's commercial speech decisions, and in the absence of any important but answered question of law raised by the decision below, the Petition for Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS CONSISTENT WITH, AND WAS MANDATED BY, THIS COURT'S DECISION IN *SHAPERO V. KENTUCKY BAR ASSOCIATION.*

This Court's jurisdiction to review decisions of the courts of appeals is tied to those cases which involve substantial conflict with this Court's decisions or important questions of law which this Court has never addressed. Rule 10, R.S.Ct. This case, in contrast, presents a decision of the Eleventh Circuit Court of Appeals which, like the district court, declared a Florida Bar rule unconstitutional based on the specific teachings of *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

Shapero examined the advertising medium of targeted direct mail advertising and found it to be essentially incapable of inflicting the wounds on the public now claimed by The Florida Bar:

> The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the *mode of communication* poses a serious danger that lawyers will exploit any such susceptibility.

* * *

> In assessing the potential for overreaching and undue influence, *the mode of communication makes all the difference.*
>
> * * *
>
> In short, both types of written solicitation [print advertising and targeted direct mail] "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." *Zauderer,* 471 U.S. at 642.

Shapero, 486 U.S. at 474-76 (emphasis supplied).

The challenged Rules attempted to do that which *Shapero* forbade — stop delivery of truthful, non-misleading targeted direct mail lawyer advertising. Rarely does a state regulation so patently violate established federal constitutional law. The decision below was correct, presented no conflict with *Shapero,* and certiorari should be denied.

II.

A 30-DAY BAN ON TRUTHFUL, NON-MISLEADING TARGETED DIRECT MAIL PERSONAL INJURY LAWYER ADVERTISING IS CONTENT-BASED, AND IS NOT A PERMISSIBLE TIME, PLACE, AND MANNER REGULATION OF SPEECH.

It is undisputed that only content-neutral restrictions on speech can be upheld on time, place, and manner grounds. (Pet. 15; Pet. App. 44; both *citing Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 294 (1984). Petitioner seeks review of the

decision below which found the 30-day ban on personal injury targeted direct mail lawyer advertising to be "unambiguously content-based," (Pet. App. 44, *see also,* district court decision at Pet. App. 26). The Florida Bar asserts that the 30-day Rule "has nothing to do with content," (Pet. 16 n.4) and should be upheld as a reasonable time, place, and manner regulation.

Both the plain words of the Rule, and the published Comment to the Rule, belie The Florida Bar's claim of content-neutrality. According to the Rule, a communication is prohibited only if it "*concerns an action for personal injury or wrongful death* or otherwise *relates to* an accident or disaster . . ." and if it is sent less than 30 days after the accident. (Rule 4-7.4(b)(1)(a); Pet. 2) (emphasis supplied). The Comment to the Rule explains, in relevant part:

> This rule allows targeted mail solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if mailed at least 30 days after the incident.

Thus, the Rule regulates targeted direct mail advertisements for specified causes of action, *not* specified recipients as the Bar claims. (*See* Pet. 16 n.4). Clearly, if a targeted direct mail lawyer advertisement letter which does *not* relate to an accident, disaster, death or injury is sent to the victim within 30 days, that letter — based on its content — would not violate Rule 4-7.4(b)(1)(a). Thus, the courts below correctly concluded that the challenged rules are content-based, and may not be justified as reasonable time, place, and manner regulations. Certiorari should be denied because the decision below is consistent with established law.

III.

THE DECISION BELOW APPLIES COMMERCIAL SPEECH PRINCIPLES IN A WAY WHICH DOES NOT CONFLICT WITH PERMISSIBLE RESTRICTIONS ON SPEECH IN SELECTED PUBLIC INSTITUTIONS.

Petitioner's primary argument in support of certiorari review is that Florida lawyers, as part of the "institution" of the administration of justice, should be subject to greater restrictions on commercial speech than those permitted by this Court's commercial speech precedents. (Pet. 9). The Florida Bar twists the cases and suggests that the court below has misapplied the law, and restricted *the State's* right to regulate speech. Of course the State's "right" is a limited one, since the First Amendment is a restraint upon governmental power, not a license to regulate. The regulation of speech requires the State to justify its restrictions. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.12 (1993).

> It is well established that "[t]he *party seeking to uphold a restriction on commercial speech carries the burden of justifying it.*" . . . This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993) (citations omitted) (emphasis supplied). Having twice been told that it failed to meet that burden, Petitioner's new argument is that its right to regulate has been unfairly restrained.

That approach attempts to liken lawyers to prisoners, schoolchildren, members of the armed forces, and public employees, all of whom, by virtue of their status in public institutions, are subject to greater restrictions on speech than could be imposed upon the general public. (Pet. at 8). Assuming *arguendo* that private lawyers are part of the "institution" of the administration of justice, the flaw in the argument is that there are a host of existing rules and regulations which do limit lawyers' ability to engage in "pure" speech as well as commercial speech, if that speech is deemed harmful to the administration of justice.[2] However, this Court has already decided, in *Shapero*, that commercial speech in the form of a truthful, non-misleading targeted direct mail letter advertisement, has a limited potential for harm.

> [T]argeted, direct mail solicitation generally — "poses much less risk of overreaching or undue influence" than does in-person solicitation. . . . Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement . . . can 'effectively avoid

---

2. *See e.g.*, R. Regulating Fla. Bar 4-1.6 ("A lawyer shall not reveal information relating to representation of a client . . ."); Rule 4-3.5 (limiting a lawyer's communication with a judge, juror, or other decision-maker); Rule 4-3.6 (limiting permissible extrajudicial statements pertaining to a case); Rule 4-3.7 (a lawyer may not serve as an advocate and a material witness); Rule 4-4.2 (limiting a lawyer's communication with persons represented by other counsel); Rules 4-7.1, 4-7.2 (limiting, *inter alia*, a statements that may be made in a lawyer's advertisement; precluding testimonials, dramatizations, multiple voices in electronic advertisements); Rule 4-7.4 (precluding in-person solicitation of prospective clients and regulating the contents of targeted direct mail solicitations); Rule 4-7.6 (limiting the ability of a lawyer to advertise that he or she is a "specialist"); and Rule 4-7.7 (regulating firm names, permissible letterheads).

> further bombardment of [his] sensibilities simply by averting [his] eyes.' "

Shapero, 108 S. Ct. at 1922-23 (citations omitted).

Petitioner baldly asserts that:

> the state must be given the latitude to regulate types of expression which are exercised within the context of certain fundamental public institutions when such expression is reasonably determined by the state to have an adverse impact upon the overall mission of the institution.

(Pet. at 9). Nothing in this record demonstrates any adverse impact upon the overall mission of the institution. Nor is there any support for the State's notion that "[t]he states have been hamstrung" by this Court's decisions. (Pet. at 10). This case was decided on summary judgment. (Pet. App. 18-29). The undisputed facts left only one question of law to be answered: was a 30-day ban on truthful, non-misleading targeted direct mail personal injury lawyer advertising consitutional? Guidance to the answer was provided by this Court's decision in *Shapero*. The decision below, and the district court decision, properly applied *Shapero* to the undisputed facts of this case. The Florida Bar's suggestion that *Shapero* and its progeny now need revisiting to preserve "a stable democracy" (Pet. at 10) substitutes rhetoric for principled reasons for certiorari review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
2441 Southwest 28th Avenue
Fort Lauderdale, Florida 33312
(305) 767-8909

BEVERLY A. POHL
Suite 200
350 Southeast Second Street
Fort Lauderdale, Florida 33301
(305) 767-8909

Attorneys for Respondents

Supreme Court, U.S.
FILED
NOV 4 1994
OFFICE OF THE CLERK

No. 94-226

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART MCHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

BARRY RICHARD
GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891
Counsel of Record

WILLIAM F. BLEWS, President
The Florida Bar

JOHN A. DEVAULT III,
President-Elect
The Florida Bar

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

40 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE COURT SHOULD RETURN TO THE STATES A REASONABLE RANGE OF AUTHORITY TO DETERMINE WHETHER ATTORNEY ADVERTISING ADVERSELY AFFECTS THE ADMINISTRATION OF JUSTICE, AND TO REGULATE IT ACCORDINGLY.

II

WHETHER THE LIMITS PLACED UPON STATE AUTHORITY BY THE DECISION BELOW EXTEND BEYOND ANY HERETOFORE RECOGNIZED BY THIS COURT AND ESTABLISH ATTORNEY ADVERTISING AS A PRIVILEGED CLASS OF COMMERCIAL SOLICITATION WITH A GREATER DEGREE OF INSULATION FROM REGULATION THAN OTHER CLASSES.

A. Whether the challenged rules meet the requirements for valid commercial regulations because they are narrowly tailored to serve substantial governmental interests.

B. Whether the challenged rules are valid time, place or manner regulations.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
LOWER COURT REPORTS AND OPINIONS	1
JURISDICTIONAL GROUNDS	1
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	1
STATEMENT OF THE CASE	3
ARGUMENT	9
I THE COURT SHOULD RETURN TO THE STATES A REASONABLE RANGE OF AUTHORITY TO DETERMINE WHETHER ATTORNEY ADVERTISING ADVERSELY AFFECTS THE ADMINISTRATION OF JUSTICE, AND TO REGULATE IT ACCORDINGLY	9
II THE LIMITS PLACED UPON STATE AUTHORITY BY THE DECISION BELOW EXTEND BEYOND ANY HERETOFORE RECOGNIZED BY THIS COURT AND ESTABLISH ATTORNEY ADVERTISING AS A PRIVILEGED CLASS OF COMMERCIAL SOLICITATION WITH A GREATER DEGREE OF INSULATION FROM REGULATION THAN OTHER CLASSES	24
A. The challenged rules meet the requirements for valid commercial regulations because they are narrowly tailored to serve substantial governmental interests	25
B. The challenged rules are valid time, place or manner restrictions	29
CONCLUSION	34

TABLE OF AUTHORITIES

Page

CASES

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) ..... *passim*

Bethel School District v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) 20

Board of Trustees v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) 25

Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) 24, 25

Clark v. Community for Creative Non-violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) 29

Cohen v. Hurley, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156 (1961) 17

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) 18

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) 18

Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) 26, 27

Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) 17

Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) 16

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) 16, 20, 21, 22

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) 16

In re R.M.J., 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982) 10

TABLE OF AUTHORITIES – Continued

Page

Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448 (1949) 26

Matter of Anis, 599 A.2d 1265 (N.J. 1992) 27

McHenry v. The Florida Bar, 21 F.3d 2258 (11th Cir. 1994) 1, 14

Members of City Counsel v. Taxpayers for Vincent, 466 U.S. 806, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) 26, 27

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) 12, 17, 19, 22, 25

Pickering v. Board of Education, 319 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)..... 18

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).....16, 18

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)..... 32

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) 11, 13, 15

The Florida Bar v. McHenry, 605 So.2d 459 (Fla. 1992)..... 5

The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar – Advertising Issues, 571 So.2d 451 (Fla. 1990).....3, 4

Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957)..... 22

Tinker v. Des Moines Independent Community School Dist., 395 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) 20

TABLE OF AUTHORITIES – Continued

Page

Ward v. Rock Against Racism, 491 U.S. 78, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).....30, 31

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).. 10, 13, 15

OTHER AUTHORITIES

Rule 4-7.4(b), Rules Regulating The Florida Bar.....*passim*

Rule 4-7.8(a), Rules Regulating The Florida Bar... 2, 4, 34

§ 322.08, Fla. Stat..... 27

28 U.S.C., § 1254(1)..... 1

28 U.S.C., § 1331 4

Amendment I, United States Constitution 1

Amendment XIV, Section 1, United States Constitution 2

LOWER COURT REPORTS AND OPINIONS

Report and Recommendation of U.S. Magistrate Judge, Case No. 92-370-CIV-T-17A (M.D. Fla., August 5, 1992) [App. 1].[1]

Order on Recommendation, Case No. 92-370-CIV-T-17A (M.D. Fla., August 5, 1992) [App. 18].

McHenry v. The Florida Bar, 21 F.3d 2258 (11th Cir. 1994) [App. 30].

JURISDICTIONAL GROUNDS

This case is before the Court on writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit entered on May 10, 1994. This Court has jurisdiction pursuant to 28 U.S.C., § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Amendment I, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

---

[1] The parties have agreed that there are no relevant documents other than those included in the Appendix to the Petition for Certiorari. Consequently, no Joint Appendix is being filed and all references are to the original Appendix.

Amendment XIV, Section 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

RULE 4-7.4 (b), Rules Regulating The Florida Bar:

> (b) Written Communication.
>
> (1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:
>
> (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

RULE 4-7.8(a), Rules Regulating the Florida Bar:

> (a) When Lawyers May Accept Referrals. A lawyer shall not accept referrals from a lawyer referral service unless the service:

> (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer;

STATEMENT OF THE CASE

In 1987, ten years after this Court first held that attorneys had a constitutional right to advertise, The Florida Bar began a two-year study of lawyer advertising and solicitation. Among other things, the study included hearings throughout the state, a review of public commentary regarding attorney advertising, and a survey by a public opinion polling organization retained by the Bar to compile statistics on public attitudes toward attorney advertising and solicitation. The complete record of information compiled in the study was submitted to the Florida Supreme Court, along with a summary of the information, as part of a petition to amend the Rules Regulating The Florida Bar with respect to advertising and solicitation.[2]

The survey found that Florida adults have negative feelings about advertising by attorneys, that the public feels that attorneys who participate in direct-mail advertising sacrifice professionalism to promote their own pecuniary self-interest, and that direct-mail advertising

---

[2] *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar – Advertising Issues*, 571 So.2d 451 (Fla. 1990). A copy of the summary which was before the Supreme Court at the time it adopted the new rules was introduced in the trial Court.

promotes frivolous and unwarranted lawsuits, resulting in higher legal costs and belittling the legal profession. [App. 6] The study found that a broad spectrum of the Florida news media, historically the most vigorous advocates of unfettered speech, had strongly condemned attorney advertising in general, and solicitation of recent accident victims or the families of victims in particular.

In February, 1991, the Florida Supreme Court adopted amendments to the advertising rules. Among the rules adopted were Rule 4-7.4(b) and Rule 4-7.8(a), Rules Regulating the Florida Bar. *The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar – Advertising Issues, supra.* Rule 4-7.4 prohibited lawyers from sending a written solicitation relating to an accident or disaster to the victim of such accident or disaster, or a relative of such victim, within 30 days after such accident or disaster. Rule 4-7.8 prohibits a lawyer from accepting a referral from a referral service which fails to comply with the rules regulating attorney communications.

In March, 1992, G. Stewart McHenry and his wholly owned corporation, Went For It, Inc., filed this action in the Middle District of Florida, challenging Rules 4-7.4 and 4-7.8 as being in derogation of the plaintiffs' free speech rights under the First Amendment to the United States Constitution. Jurisdiction of the District Court was invoked to review a question arising under the United States Constitution pursuant to 28 U.S.C., § 1331.

The Complaint alleged that McHenry had sent direct mail advertising letters concerning an action for personal injury to targeted accident victims within 30 days of the accident and wished to continue such practice in the

future. Went For It, Inc. alleged that it wished to conduct business in Florida as a lawyer referral business, and that it desired to contact accident victims and their families by mail within 30 days of an accident and to refer interested persons to personal injury attorneys in Florida.

On October 24, 1992 McHenry was disbarred by the Florida Supreme Court for conduct unrelated to the issues raised in this action.[3] McHenry's case was thereby rendered moot and the action continued on the claim of Went For It, Inc. Both parties filed motions for summary judgment which were submitted to Magistrate Judge Charles Wilson for consideration. Judge Wilson received briefs and heard oral argument, and issued his Report and Recommendation. He found that Rule 4-7.4 served a substantial governmental interest and was narrowly tailored to achieve its desired objective. Judge Wilson additionally found that the provision was a reasonable time, place or manner restriction and concluded that it did not violate the United States Constitution. He recommended that summary judgment be entered for the Bar.

The District Judge rejected the recommendation of Judge Wilson and held, as a matter of law, that the challenged rule violates the First, Fifth and Fourteenth Amendments to the United States Constitution. The Court granted summary judgment for the plaintiff.

---

[3] McHenry, who had previously been publicly reprimanded twice, was disbarred for engaging in sexual misconduct in the presence of clients. *The Florida Bar v. McHenry*, 605 So.2d 459 (Fla. 1992).

The decision was appealed to the Eleventh Circuit Court of Appeals. After filing of the Notice of Appeal, the appellees moved, without objection, to add John T. Blakely as a plaintiff based upon identical allegations to those that had been made by McHenry. The case was temporarily remanded to the trial court for consideration of the motion and Blakely was added on December 17, 1993. On May 10, 1994, the Eleventh Circuit, while expressing dissatisfaction at what it perceived to be the necessary result, affirmed.

SUMMARY OF ARGUMENT

I

The Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977), as predicted by its dissenting justices, has lead to a significant reduction in the States' ability to regulate attorney commercial solicitation. Decisions following *Bates* have been interpreted by lower Federal courts to effectively limit State regulation to in-person solicitation and deceptive advertising. The result, also predicted, has been a profound change in the professional image of the legal profession. *Bates* and its progeny have deprived States of the ability to judge the impact of such change on the administration of justice and to act accordingly. The Court imposed such limitations upon State authority by comparing the provision of legal services to the sale of commercial products and by rejecting, as a matter of law, all asserted State interests. In so doing, the Court disregarded an analytical framework which it historically had

applied to allow States greater latitude to regulate even political and ideological speech.

The Court has recognized that speech is subject to reasonable limitations when the nature of the speech is detrimental to, or inconsistent with, the mission of the public institution within which the expression is exercised. Such limitations have been upheld in the fields of public employment, education, law enforcement, and the military. In each of these fields, the Court has largely deferred to the States in the determination of whether such speech adversely affects the institutional mission, and the appropriate level of regulation. The State has a substantial interest in maintaining the professionalism of the bar and public confidence in the administration of justice. The Court should return to the States the range of authority necessary to determine whether attorney commercial solicitation adversely affects those interests and, if so, to regulate it accordingly.

Bates recognized that attorney commercial solicitation implicates First Amendment concerns because of the public's interest in receiving useful information regarding the availability of legal services, not because of the individual attorney's interest in pecuniary gain. A lawyer's financial interest has been expressly found by this Court to be only marginally affected with First Amendment concerns. Attorney commercial solicitation is an instrument of the system of justice designed to increase public access to legal services. A lawyer should not be accorded a constitutional right to appropriate that instrument to his or her own pecuniary interest without regard for the impact on the system as a whole.

II

A

While the Court is urged to revisit the underlying premise of *Bates*, it is not necessary to do so in order to uphold the challenged Florida rules. The Eleventh Circuit misconstrued this Court's holdings and accorded lawyer commercial solicitation a greater degree of protection than even political and ideological speech.

This Court has recognized that the State has a substantial enough interest in preserving the quality of life of its citizens to justify significant restrictions upon speech, including political and ideological speech, in the interests of esthetics, public comfort and convenience, and residential privacy. The State has at least as substantial an interest in protecting the personal privacy and tranquility of its citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma.

B

The Court has long recognized that even political and ideological speech is subject to reasonable time, place or manner restrictions, and the *Bates*-related decisions expressly noted that attorney advertising was not outside the scope of such restrictions. The challenged Florida rules are valid time, place or manner regulations. Contrary to the lower Court's conclusion, the rules are content-neutral as this Court has construed that term. The rules leave ample alternative means of communication and are narrowly tailored to serve the State interest.

ARGUMENT

I

THE COURT SHOULD RETURN TO THE STATES A REASONABLE RANGE OF AUTHORITY TO DETERMINE WHETHER ATTORNEY ADVERTISING ADVERSELY AFFECTS THE ADMINISTRATION OF JUSTICE, AND TO REGULATE IT ACCORDINGLY.

On June 27, 1977 the majority of this Court thrust aside centuries of Anglo-American law defining the role of the lawyer in our system of justice. The Court held in *Bates v. State Bar of Arizona, supra,* that States are constitutionally barred from prohibiting attorney advertising, including fee amounts for routine legal services. The majority opinion characterized the decision as a limited one. In his partial dissent, however, Justice Powell, joined by Justice Stewart, predicted that the result would be far from limited:

> Although the Court appears to note some reservations (mentioned below), it is clear that within undefined limits today's decision will effect profound changes in the practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened. Although the Court's opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to advertising of undefined "routine legal services."

Judge Powell's prediction proved prophetic. *Bates* was followed by a series of decisions increasingly narrowing the permissible scope of State regulation of lawyer advertising. In *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), the Court struck down a Missouri rule which prohibited the listing in an attorney's advertising of jurisdictions in which the attorney was admitted and areas of practice not approved by the bar, and the mailing of announcement cards to persons other than lawyers, clients, former clients, personal friends and relatives. The Court expressed concern over the inclusion in the advertisements of a reference in all capital letters to membership in the Bar of the Supreme Court of the United States, which the Court found to be "relatively uninformative" and in "bad taste." Nevertheless, the Court declared the regulation unconstitutional. *Id.* at U.S. 205. The Court's analysis revolved around a single question: Was the advertising deceptive or inherently misleading?

The Court further restricted States' regulatory authority in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). The attorney had been disciplined in connection with an advertisement which appeared in 36 Ohio newspapers soliciting legal business from women who had suffered injuries resulting from their use of Dalkon Shield contraceptive devices. The advertisement contained a drawing of a Dalkon Shield and informed the reader that the law firm represented clients in such cases and would handle cases on a contingent basis, and that it should not be assumed that it was too late to file a law suit. The Court struck down Ohio's rules which forbade the solicitation or

acceptance of legal employment resulting from advertisements containing information or advice regarding a specific legal problem, and which prohibited the use of illustrations in attorney advertisements. Again, the Court focused upon the question of whether the particular advertisements were deceptive or whether the mode of advertising was inherently misleading.

In *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) the Court expanded the constitutional prohibition against regulation of problem-specific advertising by holding that "targeted" direct-mail solicitation was constitutionally protected. The petitioner had applied for, and been denied, permission to send a letter to potential clients who had been sued in foreclosure actions. The letter warned recipients that they might be about to lose their home and urged:

> Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

Id. at U.S. 469. As in the cases which preceded *Shapero*, the Court applied the same constitutional standard as would be applied to the advertising of any commercial product. In addition to once again declaring that the State could only prohibit attorney advertisements that were misleading, the Court barred the State from attempting to regulate the format of an attorney advertisement:

> The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type. But a truthful and

> nondeceptive letter, no matter how big its type and how much it speculates can never "shout at the recipient" or "grasp him by the lapels," as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching. And so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient.

Id. at 478-479.[4] Thus, the majority of the Court[5] had elevated to constitutional level a lawyer's right to engage in used car type commercial appeals, complete with oversized text, loss-leader offers of "FREE" consultations, and promises of customer satisfaction.

In each of the above cases, the Court recognized that the State retained the power to regulate non-deceptive attorney advertising, provided that such regulation directly advanced a substantial governmental interest. However, the Court consistently rejected asserted governmental interests as being insufficient to justify the regulation at issue. The Court found insufficient the State's

---

[4] The Court's comment regarding face-to-face solicitation was a reference to *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), in which the Court held that Ohio could prohibit lawyers from engaging in face-to-face solicitation.

[5] Justices Rehnquist, O'Connor and Scalia dissented from the entire opinion. Justices White and Stevens dissented from the portion of the opinion denying the State the authority to regulate the pitch and style of the letter and the subjective predictions of client satisfaction.

interest in avoiding the adverse effects of advertising upon professionalism, the administration of justice, and the quality of legal services [*Bates, supra* at U.S. 368-377; *Zauderer, supra* at U.S. 647], the inherently misleading nature of attorney advertising [*Bates, supra* at U.S. 372], the difficulties of enforcing restrictions upon deceptive lawyer advertising [*Bates, supra* at U.S. 379], the desirability of avoiding the encouragement of litigation [*Zauderer, supra* at U.S. 642], and the potential for abuse of vulnerable individuals. [*Shapero, supra* at U.S. 474-476]. Each of these State interests was rejected *as a matter of law*. The Court thereby foreclosed the ability of States even to weigh the impact of such interests upon the administration of justice. The effect of the above line of decisions has been to leave lower Federal courts, including the Eleventh Circuit in this case, with the perception that, with the exception of in-person solicitation, States are limited to reviewing attorney advertising, on a case-by-case basis, for evidence of deception.

In its opinion affirming the District Court decision, the Eleventh Circuit expressed dissatisfaction with what it perceived to be the result required by this Court's line of decisions in *Bates* and the cases that followed. The Circuit Court stated:

> Justice Powell predicted in *Bates* that recognizing First Amendment protections for attorney advertising would "effect profound changes in the practice of law, viewed for centuries as a learned profession." 433 U.S. at 389, 97 S.Ct. at 2712 (Powell, J., concurring in part and dissenting in part.) That prediction has proven true. Unfortunately, the resulting changes have not necessarily been for the better. We are disturbed

> that *Bates* and its progeny require the decision we reach today.

McHenry v. The Florida Bar, 21 F.3d 2258, 2265 (11th Cir. 1994). This Court's opinion in *Bates* rested upon the presumption that attorney advertising would serve "individual and societal interests in assuring informed and reliable decisionmaking," and its finding of "the postulated connection between advertising and the erosion of true professionalism to be severely strained." Id. at U.S. 364, 368. The Court questioned the assertion that advertising would diminish attorneys' reputations in the community, noting that, "Bankers and engineers advertise, and yet these professions are not regarded as undignified." Id. at U.S. 369. In the seventeen years since the *Bates* decision, the development of attorney advertising, as suggested in the opinion below, has not been as favorable as the *Bates* Court anticipated. One need only open the yellow pages of any major city telephone directory to realize that the great bulk of attorney advertising provides citizens with little or no useful information, and is far less professional than that engaged in by bankers, engineers and most other professionals. Studies such as that performed by The Florida Bar indicate that such advertising has resulted in a negative perception of, and loss of confidence in the legal profession. In his Report and Recommendation, the Magistrate Judge found:

> The Bar's two-year study of lawyer advertising and solicitation conducted preliminarily to the implementation of its advertising rule discloses that Florida adults, generally, have negative feelings about direct-mail advertising by attorneys. The public feels that attorneys who participate in direct-mail advertising sacrifice professionalism to promote their own pecuniary

> self-interest. Florida adults believe that direct-mail advertising promotes frivolous and unwarranted lawsuits, resulting in higher legal costs and belittling the legal profession.

[*Appendix to Petition for Certiorari*, p. 6]

In her dissenting opinion in *Shapero*, Justice O'Connor, joined by Justices Rehnquist and Scalia, suggested that the time has come to reexamine the *Bates* premise:

> I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should now be reexamined.

Judge O'Connor identified the erroneous reasoning which she had referred to as "a defective analogy between professional services and standardized consumer products." *Id.* at U.S. 480. The Court is respectfully urged to consider that the consumer product analogy has, indeed, proved problematic, and that there is a more appropriate analytical framework within which to judge the attorney advertising issue.

This Court has historically recognized that the exercise of free expression is subject to reasonable limitations when the nature of such exercise is detrimental to, or inconsistent with, the mission of the public institution within which the expression is exercised. Thus, the Court

has upheld such limitations in public employment, *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) ["The determination of whether a public employer has properly discharged an employee for engaging in speech requires 'a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "], penal institutions, *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) [Prisoners "retain those First Amendment rights of speech 'not inconsistent with . . . the legitimate penological objectives of the corrections system.' "], the armed forces, *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) ["The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."], and educational institutions, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592(1988) ["A school need not tolerate student speech that is inconsistent with its 'basic educational mission' . . . even though the government could not censor similar speech outside the school."

The basic theme underlying all of the foregoing decisions is that the State must be given the latitude to regulate types of expression which are excercised within the context of certain fundamental public institutions when such expression plays an integral role in, or could have an adverse effect upon, the mission of such institution. Significantly, all of the above decisions involved the

exercise of political, ideological or religious expression, the most highly revered of all free speech rights.

It cannot be denied that the State has a substantial interest in the administration of justice. This Court has long recognized that such interest extends to the regulation of lawyers. The Court has noted that, "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice, and have historically been 'officers of the courts,' " *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), and that the States' interest in disciplining lawyers is "incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." *Cohen v. Hurley*, 366 U.S. 117, 123, 81 S.Ct. 954, 6 L.Ed.2d 156 (1961). One year after *Bates*, the Court, in a unanimous decision in *Ohralik v. Ohio State Bar Association, supra* at U.S. 460, acknowledged the States' substantial interest in regulating attorneys in general and attorney solicitation in particular:

> The state interests implicated in this case are particulary strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions.
>
> * * *
>
> While lawyers act in part as "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in the search of a just solution to disputes."

Two separate aspects of the institutional speech cases have particular application to a State's interest in regulating attorney advertising. In a series of cases involving discipline or discharge of public employees for engaging in certain speech, the Court has established a weighing test:

> The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[6]

Rankin v. McPherson, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) citing *Pickering v. Board of Education, supra;* and *Connick v. Myers*, 461 U.S. 138, 140, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). When the speech involves a matter of public concern, the employee's interest in engaging in the particular speech must be weighed against the interest of the State, as an employer, in fulfilling the mission of the agency. When the speech does not involve a matter of public concern, it is not beyond the reach of the First Amendment, but it is entitled to a substantially lesser degree of protection. In either case, the Court has extended considerable deference to the

---

[6] "Matters of public concern" has been defined as matters as to which "free and open debate is vital to informed decision-making by the electorate," *Pickering v. Board of Education*, 319 U.S. 563, 571-572, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and matters as to which debate must "be uninhibited, robust, and wide-open." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

State in the determination of whether the speech has an unduly adverse effect upon the ability of the public employer to fulfill its essential mission.

While lawyers are not public employees, the analogy is valid. As "officers of the court" lawyers perform an essential role in the administration of justice. Courts have always recognized that a lawyer's speech within the courtroom is subject to considerable judicial oversight in order to protect the integrity and efficiency of the judicial process. The fact that advertising the availability of legal services takes place outside the courtroom is of little consquence in this context. Such advertising deals solely with an essential aspect of the judicial process and is inextricably tied to the administration of the public function. To the extent that it may adversely affect the mission of the judicial system, the State has no less interest in its regulation than it does in any public employment situation. An attorney's exercise of speech in the form of a commercial solicitation does not involve a matter of public concern. The State's interest in maintaining the professionalism of the members of the bar, on the other hand, is substantial. The public's perception of, and confidence in, its system of justice and those who administer it is critical to the stability of a democratic society.[7]

---

[7] In *Ohralik v. Ohio State Bar Ass'n, supra* at U.S. 460-461, the Court noted that:

> While the Court in *Bates* determined that truthful, restrained advertising of the prices of "routine" legal services would not have an adverse effect on the professionalism of lawyers, this was only because it found "the postulated connection between advertising and the erosion of *true professionalism* to be severly strained. [citation omitted] The *Bates* Court did

The States have been hamstrung by the perception of lower Federal courts that this Court's decisions leave little or no room for States to judge the impact of attorney advertising upon the judicial system and to act accordingly. The State should be accorded the same degree of deference in judging the impact of attorney advertising upon the administration of justice as it is accorded in the public employee sphere.

The second aspect of the institutional speech cases which applies in the attorney advertising setting is reflected in *Hazelwood School District v. Kuhlmeier, supra.* The Court had previously held that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 395 U.S. 503, 511, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Nevertheless, the Court in *Hazelwood* upheld the right of the school to excise material from the school newspaper. As in the public employee cases, the Court, citing its decision in *Bethel School District v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), held that, "A school need not tolerate student speech that is inconsistent with its "basic educational mission [citation omitted] even though the government could not censor similar speech outside the school." *Id.* at U.S. 266. In addition to resting its decision upon this general principle, the Court went further and discussed the nature of the forum in which the speech was being exercised. The Court distinguished between "a student's personal expression that happens to

---

not question a State's interest in maintaining high standards among licensed professionals.

occur on the school premises" and speech that occurs in "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood, supra* at U.S. 271. The Court found that the State had significant interests that justified its control over the exercise of speech within these forums:

> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach * * * and that the views of the individual speaker are not erroneously attributed to the school. * * * A school must be able to set high standards for the student speech that is disseminated under its auspices * * * and may refuse to disseminate student speech that does not meet those standards.

Id. at 271-272.

Again, there is a material analogy to attorney advertising. The *Bates* Court did not apply First Amendment protection to attorney advertising because of the attorney's interest in pecuniary gain. It did so because of such advertising's potential to inform the public "of the availability, nature, and prices" of legal services. It concluded that "such speech serves individual and societal interests in assuring informed and reliable decisionmaking." *Bates v. State Bar of Arizona, supra* at U.S. 364. The lawyer's pecuniary interest in the advertising was of little moment in the constitutional

analysis.[8] Just as the school newspaper is primarily an instrument of the educational system designed to further its mission of providing education, attorney advertising is primarily an instrument of the judicial system designed to further its mission of making legal services accessible.

The Court in *Hazelwood* also recognized the right of the State to regulate activities that "members of the public might reasonably perceive to bear the imprimatur of the school" in order to assure that "the views of the individual speaker are not erroneously attributed to the school." *Id.* at U.S. 271. Similarly, the public might reasonably perceive attorney advertising to bear the imprimatur of the entire judicial system. It is perhaps in this respect that the analogy of legal services and commercial products is most defective. Unlike a common commercial product, the services which a lawyer sells exist only within the realm of a fundamental public function. Unlike the seller of a commercial product, the lawyer is able to offer his or her services only because he or she has been cloaked with the mantle of the State as a person with the skill and high character traits to be entrusted with the performance of a critical constitutional function. In *Theard v. United States*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957), this Court discussed the philosophical basis for control by the courts over a lawyer's professional life:

---

[8] The *Bates* Court later stated that, "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns." *Ohralik v. Ohio State Bar Association, supra* at U.S. 459.

> The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo while Chief Judge of the New York Court of Appeals. "Membership in the bar is a privilege burdened with conditions." (Matter of Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.

Attorney advertising is primarily an instrument to serve the administration of justice and its use has potential impact upon the entire legal profession and judicial system. An attorney, having been granted the privilege of serving that system, should not be heard to claim a constitutional right to appropriate such instrument to his or her own pecuniary interest without regard for its impact upon the system as a whole.

In their partial dissent in *Bates*, Justices Powell and Stewart commented:

> [T]he Court's imposition of hard and fast constitutional rules as to price advertising is neither required by precedent nor likely to serve the public interest. One of the great virtues of federalism is the opportunity it affords for experimentation and innovation, with freedom to discard or amend that which proves unsuccessful or detrimental to the public good. The constitutionalizing – indeed the affirmative encouraging – of competitive price advertising of specified legal services will substantially

> inhibit the experimentation that has been underway and also will limit the control heretofore exercised over lawyers by the respective States.

Bates at U.S. 403. The Court is respectfully urged to return to the States the latitude to weigh the value to the public of attorney commercial solicitation against the adverse effects of such solicitation and to engage in the "experimentation and innovation" which is the proper realm of the States.

II

THE LIMITS PLACED UPON STATE AUTHORITY BY THE DECISION BELOW EXTEND BEYOND ANY HERETOFORE RECOGNIZED BY THIS COURT AND ESTABLISH ATTORNEY ADVERTISING AS A PRIVILEGED CLASS OF COMMERCIAL SOLICITATION WITH A GREATER DEGREE OF INSULATION FROM REGULATION THAN OTHER CLASSES.

While the Court is urged to revisit the premise of *Bates*, it is not necessary to do so in order to reverse the opinion below. This Court has held that, "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and that attorney commercial solicitation is only "marginally affected with First Amendment concerns." *Bates, supra.* Nevertheless, the Eleventh Circuit opinion would accord lawyer commercial solicitation a greater degree of protection in certain respects than even political and ideological speech.

A. The challenged rules meet the requirements for valid commercial regulations because they are narrowly tailored to serve substantial governmental interests.

Attorney advertising falls within the scope of commercial speech which this Court has given "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values" and is subject to "modes of regulation that might be impermissible in the realm of non-commercial expression." *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978). Although regulation of commercial speech does not have to meet the least restrictive means test, the Court has held that such regulation must directly advance a substantial governmental interest and be narrowly tailored to fit the governmental objective. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d (1980); *Board of Trustees v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

The State has a substantial interest in protecting the personal privacy and tranquility of persons who were themselves, or whose loved ones were, recent victims of personal injury or death. This Court has recognized in a variety of areas that the State has a substantial interest in preserving the quality of life of its citizens. Indeed, that interest has been so substantial as to justify restrictions upon political and ideological speech. The Court has upheld ordinances prohibiting the posting of election

signs on public property, *Members of City Counsel v. Taxpayers for Vincent*, 466 U.S. 806, 104 S.Ct. 2118, 2129, 80 L.Ed.2d 772 (1984), ["It is well settled that the state may legitimately exercise its police powers to advance esthetic values."], prohibiting the use on public streets of sound trucks emitting loud noises, *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 454 (1949), ["The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience."], and prohibiting ideological picketing directed at the residence of an individual. *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

In *Frisby*, the Court upheld a law which was passed for the purpose of prohibiting anti-abortion picketing outside the residence of a doctor accused of performing abortions. The Court stated:

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.
>
> * * *
>
> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear [citations omitted] the home is different. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.

Id. at 2502. In a comment significantly descriptive of direct-mail solicitation, the Court noted that, "The type of

picketers banned by the . . . ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted residence, and to do so in an especially offensive way." *Id.* at 2503. The Court's focus on the distinction between picketing directed at the general public and picketing directed at a specific individual is directly analogous to the distinction between mass media advertising and direct-mail solicitation. The Court's concern over "residential privacy" is also applicable to much of the attorney direct-mail solicitation since it is generally directed to persons in their homes.[9]

The communication which is the subject matter of the challenged rules is no less an intrusion on personal privacy and tranquility and no less offensive than the election signs in *Taxpayers for Vincent*, the sound trucks in *Kovacs*, or the picketing in *Frisby*. To the contrary, in an important respect it is more intrusive and offensive because it involves a much more personal matter and it is knowingly and intentionally directed at persons who are most vulnerable. In *Matter of Anis*, 599 A. 2d 1265, 1270 (N.J. 1992), the Supreme Court of New Jersey described such conduct in its analysis of a restriction similar to Florida's:

---

[9] A statistical analysis by The Florida Bar of direct-mail advertising submissions from April, 1991 through March, 1992 indicates that a minimum of 87% were sent to residential addresses. The actual figure is probably close to 100% since the source of the names and addresses of most accident victims is the Department of Motor Vehicles [R. 15], and Florida law requires that drivers list their residence addresses with the Department. § 322.08, Fla. Stat.

> Nothing in the Constitution . . . requires us to countenance solicitation that intrudes upon victims or their families in the initial throes of their grief. . . . What we are talking about here . . . is conduct that is patently offensive to the common sensibilities of the community because it intrudes upon the private grief of victims or their families, serves only to compound their sorrow and solicits representation of them at a moment of their extreme vulnerability.
>
> * * *
>
> The non-intrusive nature of the communication in *Shapero* is what commended the solicitation to commercial speech protection. [citation omitted]. In contrast, the form of solicitation at issue here is so universally condemned that its intrusiveness can hardly be disputed.
>
> * * *
>
> We have no doubt, then, that the commercial speech guarantees of the First Amendment do not protect attorney conduct that is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.

The lower court decision leaves us with an indefensible legal doctrine which holds that the State has a sufficiently substantial interest in protecting the "comfort and convenience" of its citizens from loud noise or their "esthetic" sensibilities from political signs, but does not have a sufficiently substantial interest to protect them in times of deep personal trauma from crass commerical intrusion upon their private grief and residential tranquility "that

is universally regarded as deplorable and beneath common decency."

B. The challenged rules are valid time, place or manner restrictions.

While commercial speech is given only a "subordinate position in the scale of First Amendment values," political and ideological speech sit at the very top of the scale. Nevertheless, even these most highly protected forms of speech are subject to reasonable time, place and manner restrictions:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community for Creative Non-violence, 468 U.S. 288, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). The lower Court concluded that the challenged rules are not valid time, place or manner restrictions because the 30-day ban was not content-neutral.[10] The Court's conclusion is not

---

[10] Petitioner does not concede that the challenged rule requires reference to content in the first place. While the wording of the rule appears to focus on the content of the letter, in practical effect, it has nothing to do with content. Its application is based upon the nature of the intended recipient as an accident

consistent with this Court's interpretation of "content-neutral:"

> The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. [citation omitted] The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [citation omitted] Government regulation of expressive activity is content-neutral so long as it is *"justified* without reference to the content of the regulated speech."

Ward v. Rock Against Racism, 491 U.S. 78, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989) [emphasis by Court].

This Court has established that the mere fact that the content of a communication must be referred to in order to determine whether the speech is subject to the regulation does not render it content-based. The question is whether the challenged regulation is "justified without reference to the content of the regulated speech." In *Ward*, the city attempted to regulate the volume of amplified music played in a public park. The case arose out of a concert sponsored by a group dedicated to the promotion

---

victim or family of a victim. It is not necessary for the Bar to review the content of a letter in order to determine whether or not the rule is applicable. The Bar need only determine the source of the list of recipients of the letter.

of anti-racist views. The Court of Appeals struck the regulation, holding that the city had failed to prove that its regulation was the least restrictive means of regulating the volume. This Court agreed that music is a form of expression and communication which is protected under the First Amendment and that the area in which the music was being played was a public forum, "in which the government's right to regulate expression is subject to the protections of the First Amendment." *Id.* at S.Ct. 2746. Nevertheless, the Court reversed. The State interest recognized in *Ward* as being sufficiently compelling has particular bearing on the case at bar:

> The principal justification for the sound-amplification guideline is the city's desire to control noise levels at Bandshell events in order to retain the character of Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline "has nothing to do with content" [citation omitted] and it satisfies the requirement that time, place, or manner regulations be content neutral.

Id. at S.Ct. 2754.

The regulation in the case at bar meets the Supreme Court's definition of content-neutral because it is "justified without reference to the content of the regulated speech." The regulation is not intended to prohibit the message (solicitation of business), but, like the regulation in *Ward*, to avoid undue intrusion into the personal privacy of individuals during a particularly trying period, and to protect the bar and from the public perception that

it is unprofessional and driven solely by pecuniary interests. The regulation is limited to letters directed at victims of accidents or personal injury because that is the primary group which the State perceives to be in need of protection, not because of the content of the message. If the ban applied to all direct-mail solicitation, the Court below would undoubtedly have concluded that the regulation was overbroad because it would have reached solicitation that the State has no substantial interest in regulating.

The challenged rules also fall within the scope of the doctrine upon which this Court upheld the ordinance in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The ordinance prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, church, park or school. Like Rule 4-7.4(b), the Renton ordinance required reference to the content of the motion pictures shown to determine whether the regulation was applicable to a particular theater. Nevertheless, the Court upheld the ordinance based upon the fact that it was "aimed not at the content of the films shown at 'adult motion picture theaters,' but rather at the secondary effects of such theaters on the surrounding community." *Id.* at U.S. 46. Similarly, the challenged rule is not aimed at the content of the message, but at the secondary effects upon the legal profession, and ultimately upon our system of justice, occasioned by the public's reaction to the particular type of advertising.

The Court is also urged to consider that the opinion below places undue emphasis on the first element of the time, place and manner test, content review, as though it

stands alone. The content review question is, in most cases, logically intertwined with the other two elements. If the regulation is narrowly drawn and there are truly ample alternative avenues of the same communication left open, it follows that it is highly unlikely that the regulation was directed at the content of the message.

The challenged Florida rules leave ample alternative means of communication. The rules are extremely narrow, applying only during a 30-day period and only to one particular form of communication. Lawyers are free to communicate the same message by direct-mail at any time more than 30 days from the date of the accident or disaster and are free to communicate the same message by any other advertising mode during the 30-day delay. The Comments to Rule 4-7.4, as adopted by the Florida Supreme Court, make specific reference to the alternative means of advertising available to lawyers pursuant to Rule 4-7.4, including "billboards and other signs, radio, television and recorded messages the public may access by dialing a telephone number."

In *Bates*, this Court expressly noted, "that there may be reasonable restrictions on the time, place and manner of advertising." *Bates v. State Bar of Arizona*, supra at 97 S.Ct. 2709. Surely the Court was not referring only to restrictions on attorney advertising through use of loudspeakers or signs on public property. It is difficult to conceive of a type of attorney solicitation regulation that would qualify under the time, place or manner doctrine if the challenged rules do not.

The challenged rules are both reasonable commercial speech restrictions and time, place and manner regulations, and are entitled to be upheld on either basis.

CONCLUSION

The Court is respectfully urged to reverse the decision below and declare Rules 4-7.4(b) and 4-7.8(a), Rules Regulating the Florida Bar, valid. In addition, the Court is urged to revisit the *Bates* premise and broaden the discretion of the States in the regulation of attorney commercial solicitation.

Respectfully submitted,

BARRY RICHARD
GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891
Counsel of Record

WILLIAM F. BLEWS, President
The Florida Bar

JOHN A. DEVAULT III,
President-Elect
The Florida Bar

Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

No. 94-226

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

BEVERLY A. POHL
Suite 200
350 Southeast Second Street
Fort Lauderdale, Florida 33301
(305) 767-8909

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
2441 Southwest 28th Avenue
Fort Lauderdale, Florida 33312
(305) 767-8909

HOWELL L. FERGUSON
LANDERS & PARSONS
310 West College Avenue
P.O. Box 271
Tallahassee, Florida 32302
(904) 681-0311

Attorneys for Respondents

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Under *Shapero v. Kentucky Bar Association,* does a Florida Bar 30-day ban on truthful, non-misleading, personal injury direct mail letters which fully comply with the Bar's extensive regulation of the content, delivery, and style of the letters, violate the First Amendment?

II. Has The Florida Bar met its burden, under *Central Hudson* or any First Amendment test, to justify a 30-day ban on lawyers' truthful, non-misleading, personal injury targeted direct mail letters?

PARTIES BELOW

United States District Court:

Plaintiffs - G. Stewart McHenry[1]

Went For It, Inc.

Defendants - The Florida Bar

Susan V. Bloemendaal

United States Court of Appeals for the Eleventh Circuit:

Appellants - The Florida Bar

Susan V. Bloemendaal[2]

Appellees - Went For It, Inc.

John T. Blakely[3]

---

1. McHenry was not a party in the Court of Appeals because he was disbarred during the pendency of the district court proceedings and his individual claims against the Bar became moot. (Pet. Cert. App. 19-20).

2. The parties stipulated to the dismissal of Bloemendaal after the notice of appeal was filed. (R-28).

3. Blakely was added as a plaintiff-appellee during the pendency of the appellate proceedings. (Pet. Cert. App. 35 n. 7).

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	ii
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Summary of the Argument	5
Argument	7
I. *Shapero v. Kentucky Bar Association* and Established Commercial Speech Doctrine Require Affirmance of the Decision Below.	7
A. *Shapero v. Kentucky Bar Association*	7
B. The Commercial Speech First Amendment Principles	11
C. The Asserted State Interests Are Not Directly or Proportionally Served by the Rule.	13

Page

II. The 30-Day Rule Proscribing Certain Targeted Direct Mail Solicitation Is Content-Based and Violates the First Amendment. 19

III. The Court Should Decline the Florida Bar's Invitation to Revisit *Bates v. State Bar of Arizona.* 24

A. Setting the Stage: Preserving Professionalism 25

B. Emotion and Hyperbole Are No Substitute for Reasoned Analysis of this Record. 28

C. The "Summary of the Record" Does Not Carry the Weight Assigned to it by the Bar or *Amici.* 31

D. Lawyers Are Not Public Employees, Prisoners, School Children, or Members of the Armed Forces; the "Institutional Speech" Cases Do Not Support the Bar's Argument. . 35

Conclusion 37

Page

TABLE OF CITATIONS

Cases Cited:

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 4, 6, 24, 27, 28, 29, 30, 37, 38

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989). 15, 16

Caspari v. Bohlen, 114 S. Ct. 948 (1994) 4

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) ..... i, 5, 6, 20, 30, 37

City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 23

City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) 23

City of Riverside v. Rivera, 477 U.S. 561 (1986) 37

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). 20, 23

Edenfield v. Fane, 113 S. Ct. 1792 (1993) 34

Frisby v. Schultz, 487 U.S. 474 (1988) 18, 19

F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) 37

Page

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 36

Goldman v. Weinberger, 475 U.S. 503 (1986) 24, 35, 36

Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) 36, 37

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 24, 35, 36

Hudson v. Palmer, 468 U.S. 517 (1984) 24, 35

Ibanez v. Florida Dept. of Business and Prof. Reg., Bd. of Accountancy, 114 S. Ct. 2084 (1994) 11, 12, 13

In re Primus, 436 U.S. 412 (1978) 37

In re R.M.J., 455 U.S. 191 (1982) 34

Izumi Seimuitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. __, 114 S. Ct. 425 (1993) 4

Kovacs v. Cooper, 336 U.S. 77 (1949) 18, 19

Matter of Anis, 599 A.2d 1265 (N.J. 1992), *cert. denied, Anis v. New Jersey Committee on Attorney Advertising*, 112 S. Ct. 2303 (1992) 17

McHenry v. The Florida Bar, 808 F. Supp. 1543 (M.D. Fla. 1992) 1, 6

Page

McHenry v. The Florida Bar, 21 F.3d 1038 (11th Cir. 1994) 1, 6, 10, 11, 15, 22

Members of City Counsel v. Taxpayers for Vincent, 466 U.S. 789 (1984) 18, 19

Moore v. Morales, 843 F. Supp. 1124 (S.D. Tex. 1994), *appeal docketed*, No. 94-20138 (5th Cir. Mar. 1, 1994) 25

Muller v. Oregon, 208 U.S. 412 (1908) 34

Rankin v. McPherson, 483 U.S. 378 (1987) 24, 35, 36

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) .... *passim*

The Florida Bar v. Herrick, 571 So. 2d 1303 (Fla. 1990) . 18

The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar — Advertising Issues, 571 So. 2d 451 (Fla. 1990) 15, 20, 31, 34

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 20, 23

Yee v. City of Escondido, 503 U.S. ___, 112 S. Ct. 1522 (1992) 4

Statutes Cited:

28 U.S.C. § 1254(1) 1

Contents

Page

42 U.S.C. § 1983 2

42 U.S.C. § 1988 37

United States Constitution Cited:

First Amendment .....i, 6, 11, 19, 31, 38

Rules Cited:

Federal Rule of Civil Procedure, Rule 56 31

Rules Regulating The Florida Bar:

Rule 3-5.1(h) 26

Rule 4-1.5(a) 26

Rule 4-1.5(d) 26

Rule 4-1.5(f)(B) 26

Rule 4-6.1 25

Rule 4-7.1 26

Rule 4-7.2 26

Rule 4-7.2(d) 26

Rule 4-7.2(e) 26

Contents

Page

Rule 4-7.3 26

Rule 4-7.3(b)(1) 17

Rule 4-7.4 .....8, 13, 26

Rule 4-7.4(b) 38

Rule 4-7.4(b)(1)(A) 2, 19, 20

Rule 4-7.4(b)(1)(B) 8

Rule 4-7.4(b)(1)(F) 14

Rule 4-7.4(b)(2)(A) 18

Rule 4-7.5 26

Rule 4-7.8(a) 2

Ky. Supp. Ct. Rule 3.135(d)(b)(i) 7

Other Authorities Cited:

Louise Hill, *A Lawyer's Pucuniary Gain: The Enigma of Impermissible Solicitation*, 5 Geo. J. of Legal Ethics, 393 (1994) 27

Louise Hill, *Solicitation By Lawyers: Piercing the First Amendment Veil*, 42 Me. L.Rev. 376 (1990) 28, 29

Page

Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 Rutgers L. Rev. (4) 1473 (1994) 35

Katherine A. Laroe, *Much Ado About Barratry: State Regulation Of Attorneys' Targeted Direct-Mail Solicitation*, 25 St. Mary's L.J. 1513 (1994) 25, 28, 30

Karl Llewellyn, *The Common Law Tradition, Deciding Appeals*, (Little Brown 1960) 18

1993 Florida Statistical Abstract, Table 1.20, Bureau of Economic and Business Research, College of Business Administration, University of Florida (University Press of Florida 1993, 27th ed.) 33

David M. O'Brien, *Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law*, 64 Judicature No. 6, 285 (1981) 32

Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91 (1993) 32

Jay W. Stein, *Advertising in the Legal Profession (A Descriptive Bibliography and Reference Guide)*, Commission on Advertising, American Bar Association (1993) 30

The New Yorker Book of Lawyer Cartoons (Alfred A. Knopf, New York 1994) 34

Page

APPENDIX

Appendix A — Florida Rules of Discipline 1a

OPINIONS BELOW

The citation to the decision below in Petitioner's Brief (p.1) is incorrect. The correct citation is *McHenry v. The Florida Bar,* 21 F.3d 1038 (11th Cir. 1994).

The final order of the United States district court granting summary judgment in favor of respondents is reported at *McHenry v. The Florida Bar,* 808 F. Supp. 1543 (M.D. Fla. 1992). Petitioner's Brief (p.1) incorrectly cited the date of the final judgment as August 5, 1992; the correct date is December 14, 1992. (R-21, 22).

STATEMENT OF JURISDICTION

The Florida Bar filed a Petition for Writ of Certiorari on August 3, 1994, seeking review of a May 10, 1994 final judgment of the United States Court of Appeals for the Eleventh Circuit. Jurisdiction in this Court was invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents submit a separate Statement of the Case to focus on the issues which were actually litigated and decided, and to expand upon the reasoning of the courts below.

The Florida Bar begins its Statement of the Case by discussing a survey it commissioned in 1987, five years prior to the initiation of this action, and four years prior to Florida's enactment and implementation of various lawyer advertising rule changes in 1991. The complete unpublished survey is not part of the record below, and neither it nor the "summary" which was introduced in the district court (R-15), played any substantive role in this case.

In 1992, one year after the implementation of Rules 4-7.4(b)(1)(A) and 4-7.8(a), R. Regulating Fla. Bar, which imposed a 30-day ban on targeted direct mail personal injury lawyer advertising following an accident or disaster (*see* Rules set forth in Pet. Brief pp. 2-3, and in the Appendix to this Brief), G. Stewart McHenry, a Florida lawyer who had used targeted direct mail advertising in the past, and his wholly owned corporation Went For It, Inc., sued The Florida Bar and its local assistant staff attorney Susan Bloemendaal under 42 U.S.C. § 1983, seeking to declare the rules unconstitutional and to enjoin their enforcement.

The complaint alleged that McHenry and Went for It, Inc. wished to send targeted direct mail letters within 30 days of an accident or personal injury, and that Florida attorneys would utilize Went for It, Inc.'s proposed attorney referral services but for the provisions of Rules 4-7.4(b)(1)(A) and 4-7.8.[4] The Florida Bar did not file a responsive pleading, but instead agreed that there were no evidentiary matters in dispute and that the case presented only a question of law, and thus should be submitted on cross motions for summary judgment. (R-9). In its motion for summary judgment, the Bar argued only that the substantial interests served by the 30-day Rule were (1) the sensitized state of those "traumatized" by a personal injury, and (2) protecting the "personal privacy and tranquility" of those persons. (R-14-6,7).

The magistrate judge recommended that summary judgment be entered for the Bar. The district court rejected the magistrate's report and recommendation, and found that *Shapero v. Kentucky Bar Association,* 486 U.S. 466 (1988), which upheld the constitutionality of truthful, non-misleading targeted direct mail

4. Went for It, Inc. alleged that it wished to conduct business as an attorney referral service, and *via* Rule 4-7.8(a) was subject to the same advertising restrictions as were Florida attorneys. (R-1-2,5).

lawyer advertising, was controlling and dispositive. Summary judgment was entered in respondents' favor. The district court rejected the Bar's asserted substantial interests (Pet. Cert. App. p. 23), and found that the challenged rules were not narrowly tailored. *Id.* at 25.[5] The district court also rejected The Florida Bar's argument that the challenged rules were sustainable as time, place, and manner regulations, finding that the Rules were not content-neutral. Pet. Cert. App. 26-27. The district court wrote:

> The challenged rules substantially impair and impede the availability of truthful and relevant information which can make a positive contribution to consumers in need of legal services. This Court holds that as a matter of law, the Florida Bar's thirty-day ban on personal injury and wrongful death targeted direct mail lawyer advertising violates the First, Fifth, and Fourteenth Amendments to the United States Constitution.

Pet. Cert. App. 29.[6]

The United States Court of Appeals for the Eleventh Circuit

5. No Joint Appendix was prepared, per agreement of the parties. Respondents cite to "Pet. Cert. App.," the Appendix contained in the petition for writ of certiorari, and to "Resp. App.," the appendix to this brief which contains the Florida Bar rules regulating advertising and solicitation.

6. The district court declaratory judgment led the Bar to agree that it would not enforce the 30-day rule during the pendency of appellate proceedings. Thus, Florida lawyers have been free to send appropriate targeted direct mail personal injury advertisement letters, at any time, since December 14, 1992.

affirmed, holding that neither of the Bar's asserted state interests (protecting traumatized persons who are unable to make an objective evaluation of a personalized solicitation from lawyer; protecting personal privacy of injured persons and their families) justified a 30-day ban on "otherwise constitutionally protected direct mail advertising by attorneys." Pet. Cert. App. 37. Relying on *Shapero's* guidance that "[t]he relevant inquiry is the *mode* of communication," Pet. Cert. App. 40, *citing Shapero* at 474, the Eleventh Circuit found that targeted direct mail advertising "possesses limited potential for overreaching. . . ." The court below also found that *Shapero* had considered and rejected the Bar's argument that a direct mail letter impermissibly invades the privacy of the recipient. Pet. Cert. App. 43-44. Finally, like the district court, the Eleventh Circuit found that the challenged rule was "unambiguously content-based," and therefore "not a reasonable time, place, and manner restriction on speech." *Id.* at 44-45.

The Florida Bar sought review, and now asserts that an additional "substantial state interest" is a concern for professionalism, and damage to the administration of justice by advertising lawyers. Additionally, the Bar now asks that *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), be "revisit[ed]" (Pet. Brief, p. 34) and that States be given latitude to weigh the value of lawyer advertising "and to engage in the experimentation and innovation' which is the proper realm of the States." *Id.* at 24.[7]

7. The "Questions Presented for Review" in the petition for writ of certiorari do not include a request to revisit *Bates*. Our argument in Point III, *infra*, is not a concession that revisiting *Bates* is fairly included within the questions presented by the Bar, but rather a response to the request to do so in Petitioner's Brief. *Compare, Caspari v. Bohlen*, 114 S. Ct. 948 (1994) (subsidiary question fairly included); *Izumi Seimuitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. ___, 114 S. Ct. 425 (1993) (analytically and factually distinct question not fairly included); *Yee v. City of Escondido*, 503 U.S. ___, 112 S. Ct. 1522 (1992) (related, complementary question not fairly included).

SUMMARY OF THE ARGUMENT

The Florida Bar's 30-day ban on written communications concerning "an action for personal injury or wrongful death or otherwise relat[ing] to an accident or disaster," violates the First Amendment. *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), held that direct mail lawyer advertising is constitutionally protected commercial speech. The speech at issue in this case — truthful, non-misleading letters which fully conform to The Florida Bar's extensive rules on content, style and delivery — is squarely under *Shapero's* protective umbrella.

The Florida Bar offers two justifications for its 30-day ban. The first, never raised below, is that the 30-day prohibition serves "a substantial interest in maintaining the professionalism of the bar and public confidence in the administration of justice." Pet. Brief, p. 7. The second is an interest "in protecting the personal privacy and tranquility of its citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." *Id.* at 8. Although concerns for professionalism underlie all regulations of professional conduct, the Bar's tardy invocation of the "administration of justice" as its primary argument in this Court is procedurally improper, as well as substantively flawed. With that caveat, respondents address both state interests now asserted.

The burden is upon the Bar to prove that (1) its interests are substantial; (2) the 30-day ban "advances these interests in a direct and material way;" and (3) "the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) (citing the commercial speech test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)). The Bar has not carried that burden in this case.

Nothing in this record supports The Florida Bar's suggestion that professionalism, public confidence in the administration of justice, and personal privacy are directly, materially and reasonably served by the 30-day ban on attorney direct mail related to personal injury. Both the district court and the court of appeals concluded that the 30-day rule violates the First Amendment. *McHenry v. The Florida Bar,* 808 F. Supp. 1543 (M.D. Fla. 1992), *aff'd,* 21 F.3d 1038 (11th Cir. 1994); Pet. Cert. App. 18-29, 30-46. Apparently recognizing that *Shapero* and its progenitors and *Central Hudson* and its progeny condemn the Bar's rule, the Bar has asked the Court to "revisit the *Bates* [*v. State Bar of Arizona,* 433 U.S. 350 (1977)] premise and broaden the discretion of the States in the regulation of attorney commercial solicitation." Pet. Brief, p. 34. The Court should decline the invitation to scrap its precedents and to allow the States to create their own lawyer advertising First Amendment jurisprudence.

The Florida Bar and its *amici* do not offer principled bases for their attack upon *Bates* and upon established commercial speech doctrine. In briefs filled with emotion and hyperbole, references to unpublished, self-serving studies which *dehors* the record, argumentative analogies which fail the test of the legitimate leeways of precedent, and repeated disregard of the precise issues presented by the sole form of communication in this case, the Bar and its *amici* seek to exploit judicial antipathies to lawyer advertising. Reason, precedent, and *stare decisis* must guide First Amendment analysis. The decision below should be affirmed because the Bar's 30-day ban does not pass the tests of *Central Hudson* and *Shapero,* and because the Bar's "States' rights" argument fails to credit the value of First Amendment doctrinal stability.

ARGUMENT

I.

SHAPERO V. KENTUCKY BAR ASSOCIATION AND ESTABLISHED COMMERCIAL SPEECH DOCTRINE REQUIRE AFFIRMANCE OF THE DECISION BELOW

A. *Shapero v. Kentucky Bar Association*

This case presents the issue of whether Florida may, for thirty days, prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face a particular legal problem relating to a personal injury. The issue in *Shapero v. Kentucky Bar Association,* 486 U.S. 466 (1988), was nearly identical:

> This case presents the issue whether a State may, consistent with the First and Fourteenth Amendments categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

Id. at 468.

Two factors mark a minor difference between *Shapero* and this case. Kentucky's prohibition was total and related to all direct mail, including Shapero's foreclosure action letter; Florida's prohibition is for 30 days, and it applies only to letters relating to a personal injury or wrongful death.[8] Put another way,

---

8. In *Shapero,* Ky. Sup. Ct. Rule 3.135(5)(b)(i) provided:

(Cont'd)

the ban in *Shapero* was content-neutral and complete; the ban in Florida is content-based and complete for the 30-day period of

---

(Cont'd)

> A written advertisement may be sent to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Rule 4-7.4, R. Regulating Fla. Bar, provides in part:

> (b) Written Communication.
>
> (1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:
>
> (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.

In addition, Florida Bar Rules impose at least fifteen other regulatory requirements upon direct mail letters. See Rule 4-7.4(b)(1)(B) *et seq.*, reprinted in the appendix to this Brief. The decision below summarized those additional limitations:

(Cont'd)

time which follows the incident which triggers the potential need for legal services.

(Cont'd)

> (1) no letters will be sent to persons known to be represented by another attorney in the matter;
>
> (2) no letters will be sent to persons who have made it known to the sender that they do not want to receive such communication;
>
> (3) no letters will subject the recipient to coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;
>
> (4) no letters will contain false, deceptive, or unfair statements or claims;
>
> (5) no letters will be sent if the sender knows or reasonably should know that the physical, emotional or mental state of the recipient makes it unlikely that the recipient would exercise reason-able judgment in employing a lawyer;
>
> (6) the face of every envelope will be marked in red with the word "advertisement," and every page of any letter sent will be similarly marked;
>
> (7) a copy of the letter and envelope will be sent to the designated committee of the Bar and retained by the sender as required;
>
> (8) letters will be sent by regular U.S. mail only, not by any other means;
>
> (9) letters will contain no reference suggesting that the letter has been approved by the Bar;
>
> (10) the appropriate statement of qualifications will accompany each letter sent;
>
> (11) the first sentence of the letter will be "If you have already retained a lawyer for this matter, please disregard this letter";
>
> (12) the letter will look like a letter, not a pleading or other legal document;
>
> (13) if the matter will be handled by a lawyer other than the lawyer sending the letter, a statement to that effect will be included;

(Cont'd)

Both the district court and a unanimous panel of the court of appeals concluded that those differences, and the Florida Bar's rationale for distinguishing this case from *Shapero*, were not persuasive. The decision below carefully applied *Shapero*:

> The Court [in *Shapero*] thus concluded that "[t]he relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Id.*
>
> * * *
>
> The relevant inquiry is the *mode* of communication. *Id.* at 474, 108 S. Ct. 1922. A letter, especially a letter marked "advertising material" in red, possesses limited potential for overreaching, whether the client is overwhelmed by pending litigation, personal injury or grief. *See id.*
>
> * * *

(Cont'd)

> (14) the letter will disclose how the sender obtained information about the recipient's involvement in the accident or disaster that prompted the letter; and
>
> (15) the nature of the recipient's legal problem will not be revealed on the outside of the envelope.

21 F.3d at 1040 n.6; Pet. Cert. App. 33-34 n.6.

> Even if *Shapero* could be read to support restrictions based upon the letter recipient's sensitivity, we are not persuaded that the heightened sensitivity of some potential recipients justifies a prophylactic rule such as this. This is especially true considering that the period immediately following an accident or disaster may well be the time when the need for legal advice is most pressing. "[T]he States may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable." *Shapero*, 486 U.S. at 473, 108 S. Ct. at 1922.

McHenry v. The Florida Bar, 21 F.3d 1038, 1042-1043 (11th Cir. 1994); Pet. Cert. App. 40 (footnotes omitted; emphasis in original).

Shapero, its application of established commercial speech precedents, and the post-*Shapero* decisions of this Court compel the conclusion that the decision below was unremarkable: it properly applied the relevant precedents. Therefore we turn to those First Amendment principles which form the foundation for affirmance of the decision below; doctrines The Florida Bar now seeks to discard.

B. The Commercial Speech First Amendment Principles

Late last term the Court reversed the Florida Board of Accountancy's attempt to discipline a Florida lawyer who used her Certified Public Accountant (CPA) designation "in her yellow pages listing (under 'Attorneys') and on her business card [and her] 'Law Offices' stationery." *Ibanez v. Florida Dept. of Bus. and Prof. Reg., Bd. of Accountancy*, 114 S. Ct. 2084 (1994).

The Court summarized the standards for reviewing restrictions on commercial speech:

> Because "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information," *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 108 (1990), only false, deceptive or misleading commercial speech may be banned. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) . . . . Commercial speech that is not false, deceptive or misleading can be restricted, but only if the state shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 477 U.S. 557, 566 (1980); *See also, id.* at 564 (regulation will not be sustained if it "provides only ineffective or remote support for the government's purpose"); *Edenfield v. Fane*, 507 U.S. __ (1993) (slip op., at 5-6) (regulation must advance substantial state interest in a "direct and material way" and be in "reasonable proportion to the interests served"); *In re R.M.J.* [455 U.S. 191] *supra* at 203 (state can regulate commercial speech if it shows that it has "a substantial interest" and that the interference with speech is "in proportion to the interest served").

Ibanez, 114 S. Ct. at 2088-2089 (citations omitted).

Those standards are not lightly applied:

> The State's burden is not slight; the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer, supra* at 646.

Id. at 2089 (citations omitted).

Thus, the Bar must prove this case: that direct mail letters to accident victims harms them and harms the administration of justice, and that the 30-day rule directly, materially, and in a manner no more extensive than necessary, assuages those "harms." Even if we assume that protecting "disaster victims" and "the administration of justice" are substantial state interests, the Bar has not made its case.

C. The Asserted State Interests Are Not Directly or Proportionally Served by the Rule

The Comment to Rule 4-7.4 articulates the Bar's stated reason for the 30-day rule:[9]

---

9. Without conceding that it is properly preserved, we address below in Point III, the Bar's never-presented- below suggestion that direct mail somehow undermines "the public's perception of, and confidence in, [the State's] system of justice and those who administer it [thus affecting] the stability of a democratic society." Pet. Brief, p. 19 (footnote omitted). This newly advanced interest is contradicted by the Comment to Rule 4-7.4 and its statement that: "Direct written communications seeking employment by specific prospective clients generally present less potential for abuse or overreaching than in-person solicitation and are therefore not prohibited for most types of legal matters . . . ."

> This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown exist in this type of solicitation.

In its Brief, the Bar posits the interest as "protecting the personal privacy and tranquility of its citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." Pet. Brief 8. Putting aside the Bar's emotional rhetoric, and accepting that privacy in time of grief is important, the constitutional inquiry is how this 30-day rule directly, materially, and in proportion to the claimed interest, advances that interest.

Grief is not the gravamen of the 30-day rule. The rule applies to any accident. Oddly, another Florida Bar rule directly, materially and proportionally addresses the Bar's trauma theme. Rule 4-7.4(b)(1)(F) prohibits sending any written communication, at any time, if . . .

> the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

See Resp. App. p. 13a. Assuming that the Rule 4-7.4(b)(1)(F) restriction serves an important interest, the 30-day rule is distinguishable; by prohibiting written communications to all people, whatever their state of mind, it keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice. *Shapero* recognized the importance of the availability of legal information to those most needing it. 486

U.S. at 473. The court below also saw the informational importance in "the period immediately following an accident or disaster." 21 F.3d at 1043; Pet. Cert. App. 41. When the Supreme Court of Florida considered the proposed rules, Justice Shaw wrote:

> In my opinion, this constitutes an absolute ban on personal injury cases during a most critical period. This ban will effectively deprive many accident victims of information concerning the availability of professional legal assistance precisely when they need it most — during the initial period following a serious accident when they are confronted with an unintelligible legal tangle and demands to waive or compromise their rights. It is during this time that informed decisionmaking is crucial.

The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar — Advertising Issues, 571 So. 2d 451, 474 (Fla. 1990) (Shaw, C.J., concurring in part and dissenting in part).

Those concerns are underscored by the fact that there are no communication restraints imposed upon tortfeasors, their agents, or their insurers. An insurance adjuster is free to contact any injured or bereaved person within 30 minutes of an accident or disaster. The 30-day absolute prohibition on truthful, non-misleading, extensively regulated direct mail contact by lawyers with every person potentially suffering a personal injury fails every articulated standard for measuring restraints on commercial speech. *Compare, Board of Trustees of State Univ. of New York v. Fox,* 492 U.S. 469 (1989):

> Our cases have repeatedly stated that

government restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests, see, *e.g., Central Hudson, supra* at 566 . . . .

* * *

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends, *Posadas [de Puerto Rico Assocs. v. Tourism Company of Puerto,* 478 U.S.] at 341 — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is "in proportion to the interest served," *In re R.M.J., supra,* 455 U.S. at 203; that employs not necessarily the least restrictive means, but as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective.

Id. at 476-480.

The Florida Bar effort to evade those principles takes two argumentative forms. First the Bar (and its *amici*) refuse to recognize the distinctions between disaster and accident, grief and injury.[10] The second is an invocation of "residential privacy"

10. The Bar Brief repeatedly charges its arguments with melodrama: "personal grief in times of trauma" (p. 8); "loved ones were recent victims of personal injury or death" (p. 25); "times of deep personal trauma . . . private grief" (p.28); " 'universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private (Cont'd)

(Pet. Brief 27) and attempted analogies to cases concerned with residential picketing, sound trucks and election signs on public property. *Id.* at 25-27. The Bar never mentions *Shapero*'s privacy analysis. Distinguishing direct mail letters from lawyer in-person solicitation, the Court said in *Shapero:*

> A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. . . . Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

486 U.S. at 475.[11] The *Shapero* Court was succinct: "The letter

(Cont'd)
grief of victims or their families' " (pp. 28-29) (quoting from *Matter of Anis,* 599 A.2d 1265, 1270 (N.J. 1992), *cert. denied, Anis v. New Jersey Committee on Attorney Advertising,* 112 S. Ct. 2303 (1992)). The *Anis* court publicly reprimanded a lawyer for sending a false, misleading letter to the parents of a victim of the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland, two weeks after the disaster. That letter violated, *inter alia,* New Jersey RPC 7.3(b)(1), prohibiting written communication with prospective clients when an attorney "knew or should have known that the person's physical, emotional, or mental state was such that the prospective client could not exercise reasonable judgment in employing a lawyer." 599 A.2d at 1268. The Florida Bar Brief (p. 27) disingenuously describes that New Jersey rule as "a restriction similar to Florida's" all inclusive 30-day ban. Contrary to the Bar's view, neither the New Jersey rule, nor the facts underlying the *Anis* opinion, have any application to the rule in this case, which prohibits truthful, non-misleading letters directed to any injured person.

11. The Court's concerns in *Shapero* for the possible effects of (Cont'd)

simply presents no comparable risk of overreaching." *Id.* at 479.

Similarly, letters present no legitimate comparison to residential picketing, sound trucks and election signs on public property. The Bar's offering of *Frisby v. Schultz,* 487 U.S. 474 (1988); *Kovacs v. Cooper,* 336 U.S. 77 (1949); and *Members of City Counsel v. Taxpayers for Vincent,* 466 U.S. 789 (1984) (Pet. Brief 25-27) is an illegitimate use of precedent. *See* Karl Llewellyn, *The Common Law Tradition, Deciding Appeals,* (Little Brown & Co., 1960):

> When the fair—even the strained meaning of an authority is distorted into nonrecognizability, the immediate effect on the detail of the doctrine in question is confusion.

Id. at 134. Analysis of the Bar's cases reveals why this Court should reject The Florida Bar's effort to liken lawyers' letters to residential picketers, sound trucks and election signs.

The Court's support for the content-neutral ordinance in *Frisby,* which banned picketing in front of an individual's

---

(Cont'd)
personalized mailings, 486 U.S. at 476, are addressed by the myriad Florida Bar rules regulating the content, style and delivery of the letters themselves. *See* Resp. App. In particular, Rule 4-7.4(b)(2)(A), requiring the envelope and each page of the letter to be "plainly marked 'advertisement' in red ink," permits disinterested recipients to discard the letter unopened. *See The Florida Bar v. Herrick,* 571 So. 2d 1303 (Fla. 1990), sanctioning a lawyer for omitting the red "advertisement," and noting that the purpose of that rule is to "assuage any concerns the recipient may have due to receiving a personalized letter from an attorney." *Id.* at 1306. The content and style aspects of direct mail are not at issue in this case, but we note that those restrictions on the appearance of the letter may, in fact, be narrowly tailored to advance the Bar's interests.

residence, emphasized the "offensive and disturbing nature of the form of the communication." 487 U.S. at 487. The evil prevented by the ordinance was unwelcome in-person visitors at residences. *Id. Kovacs* upheld a content-neutral ordinance preventing the use of sound trucks and loudspeakers which emit "loud and raucous noises." 336 U.S. at 86.[12] *Taxpayers for Vincent* permitted a city to utilize a content-neutral ordinance prohibiting the posting of signs on public property to preserve urban aesthetics. 466 U.S. at 816.

None of those cases can honestly support the notion that a lawyer's letter poses analogous direct threats to residential auditory, visual, or emotional privacy. Indeed, the only relevant lesson of those cases is that they condemn the 30-day rule in this case because it is not content-neutral.

II.

THE 30-DAY RULE PROSCRIBING CERTAIN TARGETED DIRECT MAIL SOLICITATION IS CONTENT-BASED AND VIOLATES THE FIRST AMENDMENT

When Rule 4-7.4(b)(1)(A) was adopted by the Supreme Court of Florida in 1990, that court understood that only letters offering personal injury legal services are *verboten:*

> The proposed commentary explains that targeted mail solicitation is prohibited *only* in the areas of personal injury and wrongful death.

---

12. In *Kovacs* the Court distinguished an unwilling listener from a "passer-by who may be offered a pamphlet in the street but cannot be made to take it." *Id.* at 87. Nearly forty years later the Court similarly described mail from a lawyer as a communication which "can readily be put in a drawer to be considered later, ignored, or discarded." *Shapero,* 486 U.S. at 475-76.

The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar — Advertising Issues, 571 So. 2d 451, 454 (Fla. 1990) (emphasis in original).[13] Yet despite the plain words of the rule, and despite the Supreme Court of Florida's clear statement, the Bar says the 30-day rule is "content neutral," and argues that if the rule cannot survive under the commercial speech test of *Central Hudson*, that it is independently sustainable as a reasonable time, place, and manner restriction on speech under the test of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). *See* Pet. Brief at 29 (the 30-day rule "has nothing to do with content").

On the face of the rule, the Bar's "content neutral" argument is inexplicable. Every court which has considered it has rejected the Bar's position and found the rule to be unequivocally content-based. Furthermore, even if the rule could survive the time, place, and manner threshold of content neutrality, it is not "narrowly tailored" as required equally by *Ward*, *Clark*, and *Central Hudson*. The content-neutral regulations upheld in *Ward* (a city regulation which regulated the volume of all music, not only rock music), and *Clark* (park regulations forbidding all camping, not just that of the demonstrators), are far different from

---

13. Respondents recognize that the rule prohibits targeted direct mail advertising for a cause of action which "concerns an action for personal injury or wrongful death or *otherwise relates to* an accident or disaster," R. 4-7.4(b)(1)(A) (emphasis supplied). But whether that language encompasses only personal injury (as the Supreme Court of Florida said) or also includes non-personal injury but related matters (like probate), is irrelevant to the conclusion that the rule is content-based. It is beyond dispute that *some* targeted direct mail advertisements (*e.g.*, for forfeitures, bankruptcies, traffic offenses, divorces, non-accident-related class actions) are not banned for 30 days after an incident. Therefore, the rule is indisputably content-based; the only dispute may be over its scope. Resolution of that dispute is not necessary to the issues in this case.

The Florida Bar's content-based rule regulating only personal injury advertising by plaintiffs' attorneys.

Seeking to evade the content neutrality rules, the Bar invokes a condition-of-recipient defense that forgets *Shapero's* lesson that, in lawyer advertising, "[t]he relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the *mode of communication* poses a serious danger that lawyers will exploit such susceptibility." 486 U.S. at 474 (emphasis supplied). Here, that mode is a letter. Pursuing its flawed perspective, the Bar writes:

> The regulation is *not intended to prohibit the message* (solicitation of business), but, like the regulation [of noise] in *Ward*, to avoid undue intrusion into the personal privacy of individuals during a particularly trying period, and to protect the bar from the public perception that it is unprofessional and driven solely by pecuniary interests.
>
> * * *
>
> [T]he challenged rule is *not aimed at the content of the message*, but at the secondary effects upon the legal profession, and ultimately upon our system of justice, occasioned by the public's reaction to the particular type of adverting.

Pet. Brief 31-32 (emphasis supplied).

But it is the content — personal injury, wrongful death, or otherwise related to an accident or disaster — which dooms a

letter under the rule. Indeed, contrary to the Bar's assertion, the content of the letter is the only justification offered for the rule. The Eleventh Circuit wrote:

> States may place restrictions on the time, place, and manner of constitutionally protected communication if they do so: (1) without regard to the content of the communication, (2) in a manner narrowly tailored to serve a significant governmental interest, and (3) leaving open alternative channels for communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S. Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). We conclude that the Bar's Rule fails to meet the first element of the test described in *Clark*.
>
> On its face the thirty-day Rule is *unambiguously content-based*. It applies only to letters that "concern[] an action for personal injury or wrongful death." R. 4-7.4(b)(1)(A). It is, then the subject matter of the letter, a solicitation for a certain type of representation, that triggers application of the Rule.

21 F.3d at 1044; Pet. Cert. App. 44 (emphasis supplied). The district court also found that "it is the content of the advertisement which is banned for thirty days," and that the rule "is not content neutral and cannot be upheld as a valid time, place and manner restriction." Pet. Cert. App. 26-27.

A finding that the rule is content-based obviates the need to proceed with the time, place and manner analysis. Content

neutrality is the *sine qua non* for a permissible time, place and manner restriction. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1517 (1993). But the Bar, retreating again from the guiding legal principles, asserts that "the opinion below places undue emphasis on the first element of the time, place and manner test, content review, as though it stands alone." Pet. Brief at 32-33. Since content-neutrality is the linchpin of the *Ward* and *Clark* test, that element does stand alone, and quashes the Bar's time, place and manner argument.

This Court recently recognized that a ban on a form of speech, which contains exemptions, is suspect:

> Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place. *See, e.g., Cincinnati v. Discovery Network, Inc.*, 507 U.S. __, __, 113 S. Ct. 1505, 1511-1515, 123 L.Ed.2d 99 (1993).

City of Ladue v. Gilleo, 114 S. Ct. 2038, 2044 (1994) (holding that a total ban on residential signs — with some exemptions — was unconstitutional). Correspondingly, a ban on some but not all forms of lawyer targeted direct mail advertising, for a 30-day period, diminishes the credibility of the Bar's rationale. The Bar's "billboards, and other signs, radio, television and recorded messages" alternative means of communication argument (Pet. Brief at 33) further diminishes its cause. It is ironic and amusing that the Bar's concern for the image of lawyers and the administration of justice nevertheless allows it to prefer billboards to a letter, which is marked as an "advertisement" and

discretely delivered to someone who actually may immediately need the service offered by the lawyer.

The 30-day rule is content-based. It cannot be saved by sophistry.

III.

THE COURT SHOULD DECLINE THE FLORIDA BAR'S INVITATION TO REVISIT *BATES V. STATE BAR OF ARIZONA*

Recognizing that established precedent invalidates the 30-day rule, the Bar asks that *Bates* be revisited in the name of "maintaining the professionalism of the bar and public confidence in the administration of justice." Pet. Brief at 7. The Bar seeks to add analytical weight to its argument by analogizing lawyers to public employees (*Rankin v. McPherson*, 483 U.S. 378 (1987)); prisoners in penal institutions (*Hudson v. Palmer*, 468 U.S. 517 (1984)); soldiers, sailors and marines (*Goldman v. Weinberger*, 475 U.S. 503 (1986)); and school children (*Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)). Pet. Brief at 15-24. Those "strained analogies" (Pet. Cert. App. 26) are unconvincing.

The syllogism, according to the Bar and its *amici*, is this: since lawyers are officers of the court, and since some people do not like lawyer advertising, public confidence in the administration of justice is threatened by lawyer advertising, requiring that the states be given broad regulatory discretion in order to preserve "the stability of a democratic society." Pet. Brief 19. The Bar's construct is built on: (1) defective case analogies; (2) emotion and hyperbole; (3) refusal to adhere to the precise issue and record in this case; (4) junk social science; and (5) disregard for the established law. We address these

shortcomings below, but first we direct the Court to The Florida Bar's effort to insure high standards and professionalism in the advertising area.

A. Setting the Stage: Preserving Professionalism

Because law is a profession which serves important interests and should be imbued with high ethical standards, it is highly regulated. Law schools must strive to meet the strictures of the American Bar Association Committee on Accreditation and the accreditation standards of the American Association of Law Schools. Law students seeking admission to the bar must pass rigorous examinations, and their character is subject to review by boards of bar examiners. Once admitted, lawyers are subject to an extensive disciplinary code. Florida, like many states, requires continuing legal education of its practitioners, and encourages *pro bono* activities as part of yearly license renewal. *See* Rule 4-6.1, R. Regulating Fla. Bar. All of these constraints on conduct seek to achieve a balance between economic self-interest and devotion to the special public services performed by lawyers.

The Florida Bar has been a leader in responding to Justice O'Connor's view that "fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 491 (O'Connor, J., dissenting).[14] In addition to the rules governing "Direct Contact

---

14. All fifty states now have provisions regulating lawyers' targeted direct mail. The applicable rules are collected in the appendix to Katherine Laroe, *Much Ado About Barratry: State Regulation of Attorneys Targeted Direct-Mail Solicitation*, 25 St. Mary's L.J. 1513, 1555 (1994). Texas has attempted to follow Florida's 30-day direct mail ban; Nevada has a 45-day prohibition. *Id.* The Texas 30-day rule was found to be unconstitutional. *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Tex. 1994), *appeal docketed*, No. 94-20138 (5th Cir. Mar. 1, 1994).

with Prospective Clients" (Rule 4-7.4, reprinted in the respondents' Appendix), Rule 4-7.1 addresses "false, misleading, deceptive or unfair" communications by a lawyer. Rule 4-7.2 severely limits the style and content of all advertising, including a mandate of "no dramatization in any advertisement in any medium." Rule 4-7.2(e), R. Regulating Fla. Bar. Rule 4-7.2 also precludes the use of celebrities, multiple voices, illustrations which are not factually substantiated, and self-laudatory statements, and requires advertisements to contain a statement that hiring a lawyer "should not be based solely on advertisements." Rule 4-7.2(d).

Rule 4-7.3 requires advertising lawyers or law firms to provide printed information detailing qualifications and the standard "Statement of Client's Rights." A copy of that form is contained in the Appendix to this Brief. Resp. App. 2a-3a. And, contingency fees are regulated by Rule 4-1.5(f)(B); fees obtained in violation of the advertising rules are forfeitable. Rules 4-1.5(a) and (d) and 3-5.1(h). Resp. App. 1a-2a.

The Florida Rules create a "Standing Committee on Advertising" to evaluate lawyers' advertisements and to provide advisory opinions. Chapter 15 (Review of Lawyer Advertisements and Solicitations), R. Regulating Fla. Bar. Rule 4-7.5 details the tasks of the Committee and the applicable filing requirements.

There is no question that Florida, like the other states, has sought to preserve the high standards of the legal profession *via* diligent enforcement of the Rules of Professional Conduct in order to protect against abuses of clients and abuse of the administration of justice. The American Bar Association's Center for Professional Responsibility National Discipline Data Bank collects reported nationwide disciplinary court orders describing the facts and sanction imposed. The totals were, for 1986 - 2,652;

1987 - 1,336; 1988 - 3,072; 1989 - 4,458; and 1990 - 6,419.[15] The ABA coding categories are: Theft/Recordkeeping (trust accounts); Conflict of Interest; Neglect and Incompetence; Misrepresentation or Fraud; Relationship with Client or Court; Fees; Criminal Activity; Personal Behavior; Improper Communications. The latter grouping is further broken down into "Advertising" and "Solicitation." Of the total 13,937 reported sanctions, only 53 involved advertising and solicitation. The leading causes of discipline were neglect, incompetence, theft, recordkeeping (trust accounts), misrepresentation, fraud, personal behavior and criminal acts. *Id.*[16]

Florida's experience is similar. Of the more than 1000 reported Supreme Court of Florida lawyer discipline cases since *Bates*, only seven involved advertising, and five others involved in-person solicitation. The rest fell within the national categories enumerated above.[17]

---

15. According to the ABA, the absence of facts for coding purposes means that the actual numbers are approximately double those listed above. 1990 was the last available year.

16. One commentator, seeking more 1985-1990 information regarding solicitation, sought responses from the 57 Lawyer Disciplinary Agencies listed by the American Bar Association Center for Professional Responsibility. Louise Hill, *A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation*, 5 Geo. J. of Legal Ethics 393, 419 (1994). The reported cases involved *inter alia*, paying for referrals; contacting hospitalized persons, contacting divorce litigants, in-person solicitation of criminal defendants, contacting public officials to seek town's business. *Id.* at 419-421 nn. 154-159.

17. Florida data were obtained by searching the Westlaw FL-CS computerized database using the following query:

> ti("Florida Bar v." & complainant) & (attorney lawyer counselor /s disciplin! grievance complaint referee) & da(aft 6/27/77) % "unlicensed practice of law")

Two conclusions seem apparent from these data. First, post-*Bates* and *Shapero*, Florida has thoroughly and firmly regulated lawyer advertising to protect against false, misleading, deceptive, unprofessional, and over-reaching communications. Second, Florida's lawyers, like those nationwide, rarely run afoul of advertising rules. The transgressions which publicly tarnish our professional image relate to lawyers' disregard of their clients' interests and disregard of the laws generally applicable to all persons in our society.

B. Emotion and Hyperbole Are No Substitute for Reasoned Analysis of this Record

The Bar charges that *Bates* "thrust aside centuries of Anglo-American law" (Pet. Brief 9) and that lawyer advertising impacts "the stability of a democratic society." *Id.* at 19. The Academy of Florida Trial Lawyers Brief refers to the consequences of *Bates* as "disastrous" and "eating away at the public's confidence in the judiciary." AFTL Brief at 2, 5.

History does not support the hyperbole of the Bar or its *amici*. Our profession's English roots evolved from "[a]n intimate fraternity of rich young men [who] lived, ate, and learned the law together [and who] [b]ecause they were wealthy and did not need to earn a living, . . . viewed law practice as a public service instead of a trade . . . . Economic competition did not exist in barristers' legal or social interactions, and the profession assumed a certain cordial dignity." Katherine Laroe, *Much Ado About Barratry: State Regulation Of Attorneys' Targeted Direct-Mail Solicitation*, 25 St. Mary's L.J. 1513, 1519 (1994) [hereinafter Laroe] (footnotes omitted). In colonial America, the residue of these class distinctions led to the perception that bar associations were "the exclusive and secret trade unions of a privileged class [and] were deemed to be undemocratic and un-American." Louise Hill, *Solicitation by*

Lawyers: Piercing the First Amendment Veil, 42 Me. L. Rev. 369, 376, 379 (1990) (footnotes omitted). As a result, some states opened law practice to "every voter of good moral character[,]" making the bar "essentially open" during the nineteenth century, and leading to the suggested codes of conduct which were formalized by the Alabama State Bar Association's adoption of "the first formal Code of Ethics for the legal profession in 1887." *Id.* at 379-381 (footnotes omitted).

The cataclysmic reactions to *Bates* are belied both by the vintage of the laws prohibiting solicitation and by the ability of a democratic society and its judicial system to have survived the evolution of the legal profession from a small fraternity of men from England's first families to a profession comprised of men and women from diverse backgrounds who practice law and serve justice in a world far different from the thirteenth through nineteenth centuries. Attitudes which prevailed "as a principle of good taste among a small and homogenous group of practitioners during the formative period of the profession" do not shed much light on the First Amendment issue posed by this case. Hill, *supra*, 5 Geo. J. Legal Ethics at 394.

Seeking to avoid *Shapero* and the specific facts of this case, the Bar and all its *amici* continually refer to lawyer advertising generically, refusing to focus on direct mail. The Bar asks the Court to "open the yellow pages of any major city." Pet. Brief at 14. The Academy of Florida Trial Lawyers writes of the "bombardment of grotesque television commercials."AFTL *Amicus Curiae* Brief at 8. The multi-state *amicus* brief makes no mention of direct mail letters. The New York State Bar Association, *Amicus Curiae* Brief at 3, complains only of advertising which is "sensational, exploitive or devoid of any meaningful information." The Association of Trial Lawyers of America (ATLA) says that "unrestrained solicitation of clients may prejudice injured plaintiffs in the eyes of potential jurors."

ATLA *Amicus Curiae* Brief at 4. These and similar statements ignore the myriad bar regulatory rules in Florida and elsewhere, and the fact that this case is about truthful, non-misleading direct mail letters to people who may actually need a lawyer.[18]

Montaigne wrote: "Obstinacy and heat in argument are surest proofs of folly." *New Dictionary of Thoughts*, p. 447 (Standard Book Co. 1965). The zeal to reverse *Bates* and *Shapero*, and *Central Hudson* as applied to lawyers, has led The Florida Bar and its *amici* to arguments more shrill than sound. There is no question that *Bates* and its progeny have generated a large body of pro and con commentary. *See* Jay W. Stein, *Advertising in the Legal Profession (A Descriptive Bibliography and Reference Guide)*, Commission on Advertising, American Bar Association (1993); Laroe, *supra* at 1541, nn. 97-100. But neither reason nor the record in this case supports the doomsday entreaties of Petitioner and its *amici*.

---

18. ATLA's concern is that advertising may lower jury verdicts because jurors may be prejudiced against advertising lawyers. ATLA Brief 10-14. *Voir dire* is the traditional method used by trial lawyers to weed out prejudice, thus ATLA's concerns for plaintiffs and the contingency fees of its members can be protected without resort to reversing *Bates*. Moreover, ATLA's President, in a recent letter complaining of an (unrelated to advertising) "smear of attorneys who represent consumers," condemns "biased . . . 'studies' . . . underwritten by corporate America" and concludes with a paean which applies to the speech which ATLA seeks to suppress:

> If standing up for injured consumers against the negligent and reckless means that trial lawyers have to bear the brunt of virulent attacks, then indeed that is a small price to pay.

Larry S. Stewart, *Lawyers Will Wear Your Mud Proudly*, The Wall St. J., Nov. 23, 1994, at A-15, col. 1 (letter to the editor).

C. The "Summary of the Record" Does Not Carry the Weight Assigned to it by the Bar or *Amici*

The Bar filed in the district court "a copy of a document filed in the Supreme Court of Florida . . . on or about January 23, 1990 . . . as part of the [Bar's] petition for amendment of the Rules Regulating the Florida Bar." (R-9-1). That document, entitled "Summary of the Record," purported to summarize various materials submitted to the Supreme Court of Florida when the Bar sought approval of numerous new rules governing lawyer advertising. *The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar—Advertising Issues*, 571 So. 2d 451 (Fla. 1990). Neither the Supreme Court of Florida, nor the district court, nor the court of appeals below, mentioned the Bar's "record" in their respective opinions regarding the direct mail 30-day rule.

The summary submitted in the district court was not offered under Rule 56, Fed. R. Civ. P., as facts supporting summary judgment. The parties had stipulated that there were no disputed issues of actual fact. The only "fact" established by the filing of the summary was that it had previously been filed in the Supreme Court of Florida.

What then is the value of the summary? Is it the sort of "empirical evidence" which deserves serious consideration in deciding a First Amendment issue? Its collection of anecdotes, newspaper headlines, inadmissable hearsay and unpublished survey results, underscores the importance of this caution:

> Should the meaning of the Constitution and the Bill of Rights depend upon a sociologist's most recent study of crowd control, or a political scientist's latest public opinion survey?

David M. O'Brien, *Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law,* 64 Judicature No. 6, 285, 289 (1981) (footnotes omitted); *see also* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs,* 72 N.C. L. Rev. 91, 95 (1993) ("The poorly controlled use of social science data by *amici curiae* may not only be prejudicial to the parties, but inimical to sound judicial decision-making.").[19]

The *amici* and Florida Bar reliance on a Bar commissioned 1987 unpublished survey by Frank N. Magid Associates, *Attitudes and Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys,* exemplifies the dangers of decisions driven by surveys and anecdotes. Magid's complete report, which had been filed with the Supreme Court of Florida, reveals that its conclusions about "the public" and "Florida adults" were in fact drawn from 200 direct mail recipients, and that among those persons:

> It is true that a large majority (83%) say they would be impartial jurors in spite of receiving direct mail advertising from a lawyer.
>
> * * *
>
> It is true that the vast majority of direct mail recipients (66%) claim that their opinion of the legal profession and the judicial process has not changed since receiving direct mail advertising from an attorney.

19. Rustad and Koenig identified various categories of misuse of empirical data by past *amici* in this Court, several of which apply to *amici's* discussions of the Bar's "Summary of the Record" surveys in this case: (1) studies produced by litigants; (2) misuse of statistical tools (means versus medians); (3) the use of percentages without reporting absolute numbers; (4) failure to disaggregate data, and (5) anecdotes and bald assertions masquerading as empirical data. 72 N.C. L. Rev. 143-149.

Id. ¶ 11. Nevertheless, the Bar's Summary of the Record omitted those positive findings and the Bar's Brief loosely asserts "that Florida adults have negative feelings about advertising by attorneys" and that "the public feels" direct mail advertising "sacrifices professionalism. . . ." Pet. Brief 3. Florida's estimated population in 1987 was 12,000,000.[20] Offering Magid's 200 person unpublished "survey" as part of a "strong empirical record" (Dade County Trial Lawyers Association and the American Board of Trial Advocates as *Amicus Curiae* Brief p.8) demonstrates the fallacy of the attempts to substantiate the contention that a 30-day ban on truthful non-misleading direct mail letters directly, materially and proportionally saves the administration of justice from public opprobrium.

To the Bar's credit, its Brief refrains from serious reliance on its summary. Petitioner's *amici* submissions show little restraint, offering reports "not a matter of record in this case" (Academy of Florida Trial Lawyers *Amicus Curiae* Brief p. 7 n.4) and unpublished surveys, and questionnaires commissioned by themselves or their cohorts — surveys and questionnaires of questionable integrity, and unrelated to direct mail advertising. *See* Dade County Trial Lawyers Association Brief at 9-13; ATLA Brief at 11-14; Academy of Florida Trial Lawyers Brief at 6-7.[21]

20. *See 1993 Florida Statistical Abstract,* Table 1.20, Bureau of Economic and Business Research College of Business Administration, University of Florida (University Press of Florida 1993, 27th ed).

21. A close examination of the materials in the "Summary of the Record" reveals its deficieny in proving the Bar's case. For example, the Bar's summary of Stephanie Myers' University of Nevada masters thesis "Attorney Advertising: The Effect on Juror Perceptions and Verdicts" (May, 1988), submitted to the Supreme Court of Florida, (*see* "Summary" R-15-C9 pp. 16-18), omitted Myers' candid disclaimer (p. 62) that "no determination could be made from the data whether jurors voted against the plaintiff's attorney because he/she was a television advertiser or whether those jurors were even aware that he/she advertised at all."

In *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), the Court commented that the Florida Board of Accountancy did not offer empirical data, studies, or anecdotes to support its ban on in person solicitation. *Id.* at 1800. In *In re R.M.J.*, 455 U.S. 191, 203 (1982), the Court left latitude for "appropriate restrictions" if the "method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse . . . ."

Not a scintilla of proof has been offered in this case that truthful, non-misleading direct mail letters to injured persons, which conform to The Florida Bar's existing regulations, are inherently misleading or the subject of abuse. The Bar's effort to escape *Shapero* is now built on its claim that its surveys and anecdotes prove that such letters have damaged "public confidence in the administration of justice." Pet. Brief 7. The proffers of the Bar and its *amici*, including pages of "newspaper headlines" (Dade County Trial Lawyers Assoc. *amicus* Brief 13-14), do a disservice to *Edenfield's* comment and the *Muller v. Oregon*, 208 U.S. 412 (1908), birth of the "Brandeis brief." Any fair reading of the "record" in this case or the extra-record offerings of the Bar and its *amici* compels the conclusion that neither direct mail specifically, nor lawyer advertising generally, has harmed the administration of justice.[22]

---

22. *See, e.g., The New Yorker Book of Lawyer Cartoons* (Alfred A. Knopf, New York 1994, 7th printing) ("It's the profession we most love to hate, but even better is laughing at it. Which is exactly what these eighty-five riotously funny cartoons from the pages of the New Yorker will have you doing."). Our profession has survived centuries of disparagement and yet the administration of American justice is perhaps the most respected branch of our government. Justice Shaw's comment on The Florida Bar's efforts to stop direct mail advertising puts the Bar's pessimism in perspective: "In sum, it appears to me that the majority, out of frustration and annoyance, is swatting at a troublesome and persistent Bar fly with a sledgehammer." *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar — Advertising Issues*, 571 So. 2d 451, 475 (Fla. 1990) (Shaw, C.J., concurring in part and dissenting in part).

D. Lawyers Are Not Public Employees, Prisoner, School Children, or Members of the Armed Forces; the "Institutional Speech" Cases Do Not Support the Bar's Argument

The Bar argues that lawyer advertising should be judged as "institutional speech," not as commercial speech. Pet. Brief at 18. Building on its view that officers of the court have endangered the administration of justice by advertising, the Bar offers a series of cases — *Rankin v. McPherson*, 483 U.S. 378 (1987); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) — to support its new analytical framework.

Summing up those cases, one commentator has written:

> [T]he tenor of [those] Supreme Court decisions is that government institutions may discipline insubordinate speech that interferes with institutional goals.

Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 Rutgers L. Rev. (4) 1473, 1565 (1994) (footnote omitted). Any fair analysis of the institutional speech cases demonstrates their irrelevance here.

Nothing in the institutional speech cases suggests that the limitations applicable within certain well-defined institutions should be applied to the citizenry at large, or to regulated professionals. To the contrary, the Court has uniformly noted the limitations of its decisions. *Hudson v. Palmer:* "imprisonment carries with it the circumscription or loss of many significant rights," and prisoners retain those "rights of speech 'not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system.' "

468 U.S. at 523-24 (internal citation omitted). *Goldman v. Weinberger:* "Our review of military regulations challenged on First Amendment grounds is far more deferential then constitutional review of similar laws or regulations designed for civilian society." 475 U.S. at 507. *Hazelwood School District v. Kuhlmeier:* "[T]he First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.' " 484 U.S. at 266 (internal citation omitted). *Rankin v. McPherson:* "The determination whether a public employer has properly discharged an employee for engaging in speech requires 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer in promoting the efficiency of the public services it performs through its employees.' " 483 U.S. at 384 (internal citation omitted). To prevail the employer must show that the employee's specific statements "interfered with the efficient functioning of the office" or "discredited the office." 483 U.S. at 389.

The leap between lawyer advertising and an adverse effect on the administration of justice in Florida and the United States requires a faith not supported by the record or the case law. Insubordinate prisoners, military personnel, school children and public employees pose direct threats to the operation of their institutions. Lawyers do not. For example, lawyers who engage in political speech directly seeking to influence the administration of justice in a pending case do not pose "any real or specific threat to the legal process and . . . have the full protection of the First Amendment." *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1058 (1991). Lawyers who directly sought to advise and solicit potential class members in a pending employment discrimination case could not be restrained from speaking and writing absent "a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil Co.*

v. Bernard, 452 U.S. 89, 101 (1981) (footnote omitted).[23] Where lawyers do directly interfere with the administration of justice, their conduct, of course, is subject to sanctions. *Compare F.T.C. v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411 (1990) (lawyers' concerted conduct, boycotting low-paying CJA appointments, was an illegal restraint of trade, despite the lawyers' arguments that the boycott was expressive and political speech).

Neither case law, nor fair application of their principles supports the Bar's claim that direct mail letters, or lawyer advertising generally, so disrupts the operation of the administration of justice that *Bates, Shapero,* and their reliance on *Central Hudson* commercial speech analysis should be discarded.

CONCLUSION

The Florida Bar's extensive regulation of direct mail utilizes a series of disclosure and filing requirements. Those requirements seek to balance professionalism and the needs of potential consumers of legal services for information relating to causes of action created by the legislature, common law, and Congress.

---

23. In *Gulf Oil* the Court noted that the attorneys " 'stirring up' litigation" were like those in *In re Primus,* 436 U.S. 412 (1978), public interest lawyers. 452 U.S. at 100 n.11. If the distinction between public interest lawyering and pecuniary gain was a valid distinction a decade ago, its currency has to be re-evaluated in light of the litany of attorneys' fee decisions since then which demonstrate that practicing law for love *and* money are not inconsistent. *See, e.g.,* Title 42 U.S.C. § 1988, providing attorneys' fees to prevailing parties to encourage individuals to seek legal redress of unconstitutional state action. *City of Riverside v. Rivera,* 477 U.S. 561, 575-580 (1986).

Rule 4-7.4(b)'s 30-day direct mail ban on truthful, non-misleading letters relating to accidents and personal injuries does not directly, materially or proportionally serve any state interest. Delaying the delivery of truthful non-misleading information will neither protect privacy nor promote confidence in the administration of justice.

The Petitioner's attempt to finesse *Shapero* should be rejected. The Petitioner's invitation to revisit *Bates* and to leave lawyer advertising to state regulation should be declined. The strained legal argument and superficial "social science" survey record on which the argument is based exemplifies the danger of casting away commercial speech analytical doctrine. Professionalism, the public interest, and the First Amendment are best served by honest and objective legal standards. The emotional and exaggerated submissions of the Bar and its *amici* should be rejected, and the decision below should be affirmed.

Respectfully submitted,

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
2441 Southwest 28th Avenue
Fort Lauderdale, Florida 33312
(305) 767-8909

and

BEVERLY A. POHL
Suite 200
350 Southeast Second Street
Fort Lauderdale, Florida 33301
(305) 767-8909

and

HOWELL L. FERGUSON
LANDERS & PARSONS
310 West College Avenue
P.O. Box 271
Tallahassee, Florida 32302
(904) 681-0311

Attorneys for Respondents

December 6, 1994

APPENDIX A — FLORIDA RULES OF DISCIPLINE

RULE 3-5.1 GENERALLY

A judgment entered, finding a member of The Florida Bar guilty of misconduct, shall include one or more of the following disciplinary measures:

* * *

(h) Forfeiture of Fees. An order of the Supreme Court of Florida or a report of minor misconduct adjudicating a respondent guilty of entering into charging, or collecting a fee prohibited by the Rules Regulating The Florida Bar may order the respondent to forfeit the fee or any part thereof. In the case of a clearly excessive fee, the excessive amount of the fee may be ordered returned to the client, and a fee otherwise prohibited by the Rules Regulating The Florida Bar may be ordered forfeited to The Florida Bar Clients' Security Fund and disbursed in accordance with its rules and regulations.

RULE 4-1.5 FEES FOR LEGAL SERVICES

(a) Illegal, Prohibited, or Clearly Excessive Fees. An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

* * *

(d) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

STATEMENT OF CLIENT'S RIGHTS

Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but, as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with one lawyer you may talk with other lawyers.

2. Any contingent fee contract must be in writing and you have 3 business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in

writing within 3 business days of signing the contract. If you withdraw from the contract within the first 3 business days, you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. If your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingent fee contract with you, a lawyer must advise you whether the lawyer intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers, the lawyer should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least 1 lawyer from each law firm must sign the contingent fee contract.

5. If your lawyer intends to refer your case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other

lawyers, you should sign a new contract that includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interests and is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will be or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money that you might have to pay to your lawyer for costs and liability you might have for attorney's fees to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement you need not pay any money to anyone,

including your lawyer. You also have the right to have every lawyer or law firm working on your case sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

11. If at any time you, the client, believe that your lawyer has charged an excessive or illegal fee, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar, call 904-561-5600, or contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit.

Client Signature	Attorney Signature
Date	Date

Statement of Client's Rights amended July 23,1992, effective Jan. 1, 1993 (605 So.2d 252).

Appendix A

RULE 4-7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or permit to be made a false, misleading, deceptive, or unfair communication about the lawyer or the lawyer's services. A communication violates this rule if it:

(a) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(d) contains a testimonial.

Amended Dec. 21,1990, effective Jan. 1,1991(571 So.2d 448); July 23, 1992, effective Jan. 1,1993 (605 So.2d 252).

RULE 4-7.2 ADVERTISING

(a) Permissible Forms of Advertising. Subject to all the requirements set forth in this subchapter 4-7, including the filing requirements of rule 4-7.5, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television, and recorded messages the public may access by dialing a telephone number, or through written

Appendix A

communication not involving solicitation as defined in rule 4-7.4. These rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and is not intended for broadcast or dissemination within the State of Florida.

(b) Single Voice Requirement; Employee of Lawyer or Law Firm. Advertisements on the electronic media such as television and radio may contain the same factual information and illustrations as permitted in advertisements in the print media, but the information shall be articulated by a single voice, with no background sound other than instrumental music. The voice may be that of a full-time employee of the firm whose services are advertised; it shall not be that of a celebrity whose voice is recognizable to the public. The lawyer or full-time employee of the firm whose services are being advertised may appear on screen or on radio.

(c) Name of Lawyer or Lawyer Referral Service. All advertisements and written communications pursuant to these rules shall include the name of at least 1 lawyer or the lawyer referral service responsible for their content.

(d) Disclosure Statement. Except as provided in this subdivision, all advertisements, other than lawyer referral service advertisements shall contain the following disclosure: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience." Lawyer referral service advertisements shall contain the following disclosure: "The hiring of a lawyer is an

important decision. Before you decide to hire the lawyer to whom you are referred, ask that lawyer for written information about that lawyer's qualifications and experience." These disclosures need not appear in electronic advertisements or advertisements in the public print media that contain no illustrations and no information other than that listed in subdivision (n)(1)-(10) of this rule.

(e) Dramatizations Prohibited. There shall be no dramatization in any advertisement in any medium.

(f) Use of Illustrations. Illustrations used in advertisements shall present information that can be factually substantiated and is not merely self-laudatory.

(g) Fields of Practice. Every advertisement and written communication that indicates 1 or more areas of law in which the lawyer or law firm practices shall conform to the requirements of rule 4-7.6.

(h) Disclosure of Liability for Expenses Other Than Fees. Every advertisement and written communication that contains information about the lawyer's fee, including those that indicate no fee will be charged in the absence of a recovery, shall disclose whether the client will be liable for any expenses in addition to the fee. Additionally, advertisements and written communications indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall disclose (1) that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable; and (2) whether the percentage fee will be computed before expenses are deducted from the recovery, if the lawyer intends to compute the percentage fee before deducting the expenses.

(i) Period for Which Advertised Fee Must Be Honored. A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than 1 year following publication.

(j) Self Laudatory Statements. A lawyer shall not make statements that are merely self-laudatory or statements describing or characterizing the quality of the lawyer's services in advertisements and written communications; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients.

(k) Firm Name. A lawyer shall not advertise services under a name that violates the provisions of rule 4-7.7.

(l) Location of Practice. All advertisements and written communications provided for under these rules shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made.

(m) Payment by Nonadvertising Lawyer. No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm unless the

advertisement discloses the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer and the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

(n) Permissible Content of Advertisements. The following information in advertisements and written communications shall be presumed not to violate the provisions of rule 4-7.1:

(1) subject to the requirements of this rule and rule 4-7.7, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, and a designation such as "attorney" or "law firm";

(2) date of admission to The Florida Bar and any other bars and a listing of federal courts and jurisdictions other than Florida where the lawyer is licensed to practice;

(3) technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received, including dates and institutions;

(4) foreign language ability;

(5) fields of law in which the lawyer practices, subject to the requirements of rule 4-7.6;

(6) prepaid or group legal service plans in which the lawyer participates;

(7) acceptance of credit cards;

(8) fee for initial consultation and fee schedule, subject to the requirements of subdivisions (h) and (i) f this rule;

(9) a listing of the name and geographic location of lawyer or law firm as a sponsor of a public service announcement or charitable, civic, or community program or event; and

(10) a lawyer referral service may advertise its name, location, telephone number, the referral fee charged, its hours of operation, the process by which referrals are made, the areas of law in which referrals are offered, the geographic area in which the lawyers practice to whom those responding to the advertisement will be referred, and, if applicable, its nonprofit status, its status as a lawyer referral service approved by The Florida Bar, and the logo of its sponsoring bar association.

(o) Advertising in Law Directory. Nothing in this rule prohibits a lawyer or law firm from permitting the inclusion in law lists and law directories intended primarily for the use of the legal profession of such information as has traditionally been included in these publications.

(p) Maintaining Copies of Advertisements. A copy or recording of an advertisement or written or recorded communication shall be submitted to the standing committee on advertising in accordance with the requirements of rule 4-7.5, and the lawyer shall retain a copy or recording for 3 years after its last dissemination along with a record of when and where it was used.

(q) Payment for Recommendations; Lawyer Referral

Service Fees. A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these rules, may pay the usual charges of a lawyer referral service or other legal service organization, and may purchase a law practice in accordance with rule 4-1.17.

Amended Dec. 21,1990, effective Jan. 1,1991(571 So.2d 448); July 23,1992, effective Jan. 1, 1993 (605 So.2d 252); amended effective July 1, 1993 (621 So.2d 1032).

RULE 4-7.4 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) Solicitation. A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule.

(b) Written Communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner,

an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication;

(B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;

(C) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;

(D) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

(E) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or aim or is improper under rule 4-7.1; or

(F) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

Appendix A

(2) Written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

(A) Each page of such written communications shall be plainly marked "advertisement" in red ink, and the lower left corner of the face of the envelope containing a written communication likewise shall carry a prominent, red "advertisement" mark. If the written communication is in the form of a self-mailing brochure or pamphlet, the "advertisement" mark in red ink shall appear on the address panel of the brochure or pamphlet. Brochures solicited by clients or prospective clients need not contain the "advertisement" mark.

(B) A copy of each such written communication and a sample of the envelopes in which the communications are enclosed shall be filed with the standing committee on advertising either prior to or concurrently with the mailing of the communication to a prospective client, as provided in rule 4-7.5. The lawyer also shall retain a copy of each written communication for 3 years. If written communications identical in content are sent to 2 or more prospective clients, the lawyer may comply with this requirement by filing a single copy together with a list of the names and addresses of persons to whom the written communication was sent, retaining the same information. If the lawyer periodically sends the identical communication to additional prospective clients, lists of the additional names and addresses shall be filed with the committee no less frequently than monthly.

(C) Written communications mailed to prospective clients shall be sent only by regular U.S. mail not by registered mail or other forms of restricted delivery.

Appendix A

(D) No reference shall be made in the communication to the communication's having received any kind of approval from The Florida Bar.

(E) Every written communication shall be accompanied by a written statement of the lawyer's or law firm's qualifications conforming to the requirements rule 4-7.3.

(F) If a contract for representation is mailed with the written communication, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size 1 size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

(G) The first sentence of any written communication concerning a specific matter shall be: "If you have already retained a lawyer for this matter, please disregard this letter."

(H) Written communications shall be on letter-sized paper rather than legal-sized paper and shall not be made to resemble legal pleadings or other legal documents. This provision does not preclude the mailing of brochures and pamphlets.

(I) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the client.

(J) Any written communication prompted by a specific

occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

(K) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

Former Rule 4-7.3 renumbered as 4-7.4 Oct. 22,1987, effective Jan. 1, 1988 (519 So.2d 971). Amended Dec. 21, 1990, effective Jan. 1,1991(571 So.2d 448); July 23,1992, effective Jan. 1,1993 (605 So.2d 252).

RULE 4-7.5 EVALUATION OF ADVERTISEMENTS

(a) Advisory Opinion. A lawyer may obtain an advisory opinion concerning the compliance of a contemplated advertisement or written communication with these rules in advance of disseminating the advertisement or communication by submitting the material and fee specified in subdivision (d) to the standing committee on advertising at least 15 days prior to such dissemination. If the committee finds that the advertisement complies with these rules, the lawyer's voluntary submission shall be deemed to satisfy the filing requirement set forth in subdivision (b) of this rule.

(b) Filing Copy of Advertisement. Subject to the exemptions stated in subdivision (c) of this rule, any lawyer who advertises services through any public media or through written communication not involving solicitation as defined in rule 4-7.4

shall file a copy of each such advertisement with the standing committee on advertising for evaluation of compliance with these rules. The copy shall be filed either prior to or concurrently with the lawyer's first dissemination of the advertisement or written communication and shall be accompanied by the information and fee specified in subdivision (d).

(c) Exemptions From Filing Requirement. The following are exempt from the filing requirements of subdivision (b) of this rule:

(1) Any advertisement in any of the public media, including the yellow pages of telephone directories, that contains no illustrations and no information other than that set forth in rule 4-7.2(n)(1)-(10). This exemption extends to television advertisements only if the visual display featured in such advertisements is limited to the words spoken by the announcer.

(2) A brief announcement in any of the public media that identifies a lawyer or law firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event, provided that the announcement contains no information about the lawyer or law firm other than name, the city where the law offices are located, and the fact of the sponsorship or contribution.

(3) A listing or entry in a law list.

(4) A newsletter mailed only to existing clients or other lawyers.

(5) Professional announcement cards stating new or changed associations, new offices, and similar changes relating

to a lawyer or law firm, and that are mailed only to other lawyers, relatives, close personal friends and existing clients.

(d) Contents of Filing. A filing with the committee as required by subdivision (b) or as permitted by subdivision (a) shall consist of:

(1) a copy of the advertisement or communication in the form or forms in which it is to be disseminated e.g, videotapes, audiotapes, print media, photographs of outdoor advertising);

(2) a transcript, if the advertisement or communication is on videotape or audiotape;

(3) a statement listing all media in which the advertisement or communication will appear, the anticipated frequency of use of the advertisement or communication in each medium in which it will appear, and the anticipated time period during which the advertisement or communication will be used; and

(4) a fee to be set by the board of governors but not exceeding $50, payable to The Florida Bar, to offer the cost of evaluation and review of advertisement submitted under these rules and the cost of enforcing these rules.

(e) Evaluation of Advertisements. The committee shall evaluate all advertisements and written communications filed with it pursuant to this rule compliance with the applicable rules set forth in this subchapter 4-7. The committee shall complete its evaluation within 15 days of receipt of a filing unless the committee determines that there is reasonable doubt that the advertisement or written communication is in compliance with the rules and that further examination is warranted but cannot be completed within the 15-day period, and so advises the lawyer

within the 15-day period. In the latter event, the committee shall complete its review as promptly as the circumstances reasonably allow. If the committee does not send any communication to the lawyer within 15 days, the advertisement will be deemed approved.

(f) Substantiating Information. If requested to do so by the committee, the filing lawyer shall submit information to substantiate representations made or implied in that lawyer's advertisement or written communication.

(g) Notice of Noncompliance; Effect of Continued Use of Advertisement. When the committee determines that an advertisement or written communication is not in compliance with the applicable rules, the committee shall advise the lawyer that dissemination or continued dissemination of the advertisement or written communication may result in professional discipline.

(h) Committee Determination Not Binding; Evidence. A finding by the committee of either compliance or noncompliance shall not be binding in a grievance proceeding, but may be offered as evidence.

(i) Change of Circumstances; Refiling Requirement. If a change of circumstances occurring subsequent to the committee's evaluation of an advertisement or written communication raises a substantial possibility that the advertisement or communication has become false or misleading as a result of the change in circumstances, the lawyer shall promptly refile the advertisement or a modified advertisement with the committee along with an explanation of the change in circumstances and an additional fee to be set by the board of governors but not exceeding $50.

Added Dec. 21, 1990, effective Jan. 1, 1991 (571 So.2d 448. Amended July 23,1992, effective Jan. 1, 1993 (605 So.2d 252); amended effective July 1, 1993 (621 So.2d 1032).

CHAPTER 15. REVIEW OF LAWYER ADVERTISEMENTS AND SOLICITATIONS

15.1 GENERALLY

RULE 15-1.1 PURPOSE

The Florida Bar, as an official arm of the Supreme Court of Florida, is charged with the duty of enforcing the rules governing lawyer advertising and solicitation and with assisting members of The Florida Bar to advertise their services in a manner beneficial to both the public and the legal profession. The board of governors, pursuant to the authority vested in it under rule 2-8.3, shall create a standing committee on advertising to advise members of The Florida Bar on permissible advertising and solicitation practices. It shall be the duty of the committee to administer the advertising evaluation program set forth in rule 4-7.5.

Added Dec. 20, 1990, effective Jan. 1,1991 (571 So.2d 451). Amended July 23,1992, effective Jan. 1,1993 (605 So.2d 252).

15-2. STANDING COMMITTEE ON ADVERTISING

RULE 15-2.1 MEMBERSHIP AND TERMS

The standing committee on advertising shall consist of 4 members of The Florida Bar and 3 nonlawyers representing the public. Members of the committee shall be appointed by the

president-elect of The Florida Bar, as provided in rule 2-8.1. The president-elect shall designate the chair and vice-chair, with the advice and consent of the board of governors. Members of the committee shall serve staggered 3-year terms. No member may serve more than 2 consecutive terms. A quorum shall consist of a majority of the members.

Added Dec. 21, 1990, effective Jan. 1,1991 (571 So.2d 451). Amended July 23,1992, effective Jan. 1,1993 (605 So.2d 252).

RULE 15-2.2 FUNCTIONS

It shall be the task of the committee to evaluate all advertisements filed with the committee for compliance with the rules governing advertising and solicitation and to provide written advisory opinions concerning compliance to the respective filers, to develop a handbook on advertising for the guidance of and dissemination to members of The Florida Bar, and to recommend to the board of governors from time to time such amendments to the Rules of Professional Conduct as the committee may deem advisable.

Added Dec. 21, 1990, effective Jan. 1,1991 (571 So.2d 451). Amended July 23,1992, effective Jan. 1,1993 (605 So.2d 252).

RULE 15-2.3 REIMBURSEMENT FOR PUBLIC MEMBERS

The nonlawyer public members of the standing committee shall be reimbursed for reasonable travel and related expenses associated with attendance at meetings of the committee.

Added Dec. 21, 1990, effective Jan. 1,1991 (571 So.2d 451). Amended July 23,1992, effective Jan. 1,1993 (605 So.2d 252).

Supreme Court, U.S.
FILED
DEC 20 1994
OFFICE OF THE CLERK

No. 94-226

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART MCHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

BARRY RICHARD
GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891
Counsel of Record

WILLIAM F. BLEWS, President
The Florida Bar

JOHN A. DEVAULT III,
President-Elect
The Florida Bar

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I THE COURT SHOULD RETURN TO THE STATES A REASONABLE RANGE OF AUTHORITY TO DETERMINE WHETHER ATTORNEY ADVERTISING ADVERSELY AFFECTS THE ADMINISTRATION OF JUSTICE, AND TO REGULATE IT ACCORDINGLY 1

II THE LIMITS PLACED UPON STATE AUTHORITY BY THE DECISION BELOW EXTEND BEYOND ANY HERETOFORE RECOGNIZED BY THIS COURT AND ESTABLISH ATTORNEY ADVERTISING AS A PRIVILEGED CLASS OF COMMERCIAL SOLICITATION WITH A GREATER DEGREE OF INSULATION FROM REGULATION THAN OTHER CLASSES 12

A. The challenged rules meet the requirements for valid commercial regulations because they are narrowly tailored to serve substantial governmental interests 12

B. The challenged rules are valid time, place or manner restrictions 16

TABLE OF AUTHORITIES

Page

CASES

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) ..... *passim*

Board of Trustees v. Fox, 492 U. S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) 9, 10, 11, 12, 15

Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 557, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980) 8, 9, 14, 15

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) 4

Edenfield v. Fane, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) 3

Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) 13

Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) 3, 5

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) 3, 4, 5

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) 3, 5

International Society for Krishna Consciousness, Inc. v. Lee, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) 4

Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448 (1949) 12, 14

McDonald v. Board of Election Comm'rs, 394 U.S. 802, 89 S.Ct. 1404 (1969) 17

TABLE OF AUTHORITIES – Continued

Page

Members of City Counsel v. Taxpayers for Vincent, 466 U.S. 806, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) 12, 14

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) 10, 11

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) 7

Peel v. Attorney Registration and Disciplinary Com'n, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990) 8

Planned Parenthood v. Casey, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) 6, 7

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) 3, 5

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) 16, 17, 18

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) 6

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) 8, 9, 10, 11

Ward v. Rock Against Racism, 491 U.S. 78, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) 13, 14, 16

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461 (1955) 17

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) 8

RULES

Sup. Ct. R. 24 1

ARGUMENT

I

THE COURT SHOULD RETURN TO THE STATES A REASONABLE RANGE OF AUTHORITY TO DETERMINE WHETHER ATTORNEY ADVERTISING ADVERSELY AFFECTS THE ADMINISTRATION OF JUSTICE, AND TO REGULATE IT ACCORDINGLY.

In its initial brief on the merits, The Florida Bar urged the Court to revisit the line of cases following *Bates* and to return to the States a reasonable degree of authority to determine whether attorney advertising adversely affects the administration of justice. The Respondent complains that the request to revisit the *Bates* cases introduced a new issue that was not included in the Questions Presented for Review in the Petition for Writ of Certiorari. Rule 24 of the Rules of the Supreme Court of the United States provides that the phrasing of the questions presented for review in a Brief on the Merits need not be identical with the questions set forth in the Petition for Writ of Certiorari, as long as the brief on the merits does not raise additional questions or change the substance of the questions already presented. The Florida Bar's brief on the merits is in full compliance with Rule 24. The substance of the Bar's argument presented under Point I of its brief on the merits was thoroughly laid out under Point I in the Petition for Writ of Certiorari.

The Respondents and amici argue that the record is devoid of any evidence that attorney advertising has had an adverse effect upon the administration of justice, and they present data indicating that there has been a relatively small number of lawyer disciplinary cases involving advertising. The arguments smack of the very

sophistry which the Respondent decries. The decisions following *Bates*, and their interpretation by lower federal courts, have severely narrowed the scope of permissible state regulation so that the States are now effectively limited to merely investigating and regulating deception, and nothing more. Even the regulation of deceptive advertising has been heavily burdened by the Court so that States must either show actual deception in a given case or must leap a high hurdle to establish that a given type of advertising is inherently misleading. Given the narrow range of permissible State action, it is not surprising that there are relatively few attorney disciplinary cases involving advertising. That fact alone does not establish that the nature and scope of attorney advertising which has developed since *Bates* is not adversely affecting the administration of justice.

It is also understandable that the record does not include conclusive proof of such adverse effect. As illustrated in The Florida Bar's initial brief, the decisions following *Bates* have held, as a matter of law, that States do not have a sufficient interest to step beyond the role of investigating deception in attorney advertising. As a result, States have not had the occasion or incentive to produce a record showing that other aspects of such advertising have an adverse impact upon substantial State interests. What The Florida Bar and its supporting amici urge is that the philosophical basis upon which State authority has been so severely restricted is unjustified by First Amendment law in general, and inconsistent with the application of commercial regulatory law in contexts other than attorney advertising.

Both the Respondent and amicus Institute for Access argue that the institutional speech cases cited by The Florida Bar are inapplicable to the case at bar.[1] The Respondent states that nothing in the institutional speech cases indicated that the Court intended that they be applied to the citizenry at large or to regulated professions. The Florida Bar has not suggested that they be so applied. As was discussed at some length in the Bar's initial Brief on the Merits, lawyers, in the conduct of their professional activities, are not judged as citizens at large, but as officers of the court entrusted with the administration of an essential element of a fundamental constitutional function. This Court recognized in *Edenfield v. Fane*, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), that the application of First Amendment principles to professional advertising is not necessarily the same for lawyers as for other professionals.

The Respondent argues that the institutional speech cases are inapplicable to lawyer advertising cases because, "insubordinate prisoners, military personnel, school children and public employees pose direct threats to the operation of their institutions." *Brief of Respondents*, p. 36. Amicus Institute for Access argues that the institutional speech decisions are distinguishable because they involve speech which occurred on property owned by the

---

[1] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988); *Rankin v. McPherson* , 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986).

government. Neither of the asserted distinctions has substance.

The institutional speech cases make no mention of the necessity of a direct threat to the institution's operation. They say only that the State can constitutionally regulate speech that is inconsistent with the mission of the institution. The cases also say nothing about the necessity of the speech taking place on government owned property. In this regard, amicus confuses the institutional speech cases with those in which reduced scrutiny was applied because the government was the proprietor of the property on which the speech occurred. Those cases have held that government owned property which has not been designated as a public forum may be restricted in its use, and a lesser First Amendment standard is then applicable. *E.g., International Society for Krishna Consciousness, Inc. v. Lee,* 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). The institutional speech cases cited in the Bar's Petition and Brief on the Merits rest upon a different philosophical premise. Those cases were not concerned with the nature of the property upon which the speech was exercised, but with the effect of the speech on the basic mission of the institution. Thus, in *Hazelwood, supra,* the Court focused upon speech expressed in "a school-sponsored publication, theatrical production, or other vehicle of student expression" having a "valid educational purpose." *Id.* at U.S. 273. As noted in the Bar's initial brief, the Court's concern was both with the effect upon the education of the students and the fact that the publication or production carried the

"imprimatur" of the State. The Court's reasoning in *Hazelwood* would have applied equally whether the expression took place in a play or publication produced on the school campus or anywhere else. The same is true of the reasoning in *Rankin, supra, Hudson, supra,* and *Goldman, supra.* The State's ability to impose reasonable regulations upon the speech of its employees, prisoners and military personnel in order to foster the successful pursuit of basic institutional missions remains the same whether that mission is taking place on government owned or controlled property or anywhere else.

This Court has recognized that a lawyer's professional advertising is entitled to First Amendment protection primarily because of its role in making the public aware of the availability of legal services and thereby increasing access to our system of justice. The State's interest in the effective administration of justice is surely as substantial as its interest in providing education, law enforcement, national defense and efficient public employment. Nevertheless, the *Bates* cases have failed to include consideration of the potential impact of attorney advertising upon the mission of administering justice as a factor in the overall equation.[2]

Amicus Institute for Access argues that *stare decisis* requires that this Court adhere to the precedent set in

---

[2] The Respondents state that this is an "additional" State interest not mentioned in the lower courts. The State interest in the impact of attorney advertising upon professionalism and the administration of justice was not relevant below because a lower court cannot overrule a decision of this Court. Only this Court can revisit *Bates* and the cases which followed it.

Bates and its progeny. In support of its argument, amicus relies heavily upon this Court's decision in *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The Court has long recognized and in fact, reaffirmed in *Casey*, that "the rule of *stare decisis* is not an 'inexorable command,' and certainly is not such in every constitutional case." *Planned Parenthood v. Casey, supra* at S.Ct. 2808, and cases cited therein. In *Casey*, the Court took pains to note that the case required a uniquely stringent application of *stare decisis*. In its review of the principles announced in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), the Court stated:

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls for the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.
>
> The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation.

Planned Parenhood v. Casey, supra at S.Ct. 2815. The case at bar does not involve one of those rare, intensely divisive national controversies and does not require the "rare

precedential force" that the majority considered necessary in *Casey*.[3]

A more comparable case to the case at bar, decided the year before *Casey*, was *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). In *Payne*, the Court also addressed the issue of *stare decisis*, concluding:

> [W]hen governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." [citation omitted] Stare decisis is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." [citation omitted] This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible."

Id. at U.S. 827. The Court noted that during the previous 20 terms it had overruled in whole or in part 33 of its previous constitutional decisions. It further justified its retreat from the earlier decisions on the grounds that such cases "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," and that the decisions had been "questioned by members of the Court in later decisions," and had "defied consistent application by the lower courts." *Id.* at U.S. 827-829. The description would aptly apply to *Bates*. The *Bates* cases have been characterized by

---

[3] Having recognized that *stare decisis* is entitled to differing degrees of weight, depending upon the circumstances, it seems logical that the Court should afford it the least weight when considering matters involving the "internal" administration of its own profession and the regulation of its own officers.

a lack of consensus and shifting and splintered majorities. In the three major attorney advertising decisions which struck regulations following *Bates*, seven different justices have filed separate opinions expressing the belief that, in various degrees, the decisions were unduly restricting the ability of the States to regulate the particular advertising involved.[4] The frequency with which this Court has reversed attorney advertising decisions since *Bates* reflects, a continuing lack of consistent application.

The *Bates* line of cases were themselves inconsistent with case law that this Court was simultaneously developing and applying in other commercial speech contexts. Not only did the *Bates* cases fail to employ the reasoning which underlay the institutional speech cases, they imposed far greater restriction upon State regulation than is required by this Court's other commercial speech decisions. The Respondent and amici rely heavily upon *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980) as the seminal case establishing the test for valid commercial speech regulation. Yet, Justice O'Connor has noted that *Central Hudson* provides the very basis for returning to the States the legislative authority that was denied them by *Bates* and its progeny:

> Under the *Central Hudson* test, government has more than ample justification for banning or

---

[4] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); *Peel v. Attorney Registration and Disciplinary Com'n*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990).

strictly regulating most forms of price advertising.

* * *

Bates was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its application. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. *Central Hudson's* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in light of that doctrine.

Shapero v. Kentucky Bar Association, supra at U.S. 486, 487. In its application of the *Central Hudson* test to commercial speech in general, this Court has recognized the need to provide States with a reasonable degree of deference and has expressly rejected the least restrictive means test. *Board of Trustees v. Fox*, 492 U. S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Nevertheless, the attorney advertising cases decided since *Bates* have afforded the States virtually no deference, and have analyzed attorney advertising regulations in a manner which amounts to nothing less than the least restrictive means test.[5]

The majority in *Shapero*, for example, held that the State had no substantial interest sufficient to justify its regulation of the "pitch or style of a letter's type and its

---

[5] As will be illustrated below, both the Respondent and amici are urging the Court to apply the least restrictive means test in the case at bar as well.

inclusion of subjective predictions of client satisfaction * * * ." The Court concluded that "a truthful and nondeceptive letter, no matter how big its type and how much it speculates can never 'shout at the recipient' or 'grasp him by the lapels' [citing *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978)] as can a lawyer engaging in face-to-face solicitation." *Shapero*, at U.S. 479. The Court thus overlooked the premise of the institutional speech cases and deprived the State of the ability to measure whether such used car type sales pitches adversely affected the public's perception of the legal profession and, in turn, its attitude toward, and faith in, the entire system of justice.[6] *Shapero* also was inconsistent with the Court's ruling one year later in *Fox* with respect to the importance of granting a reasonable degree of leeway to governmental decisionmakers "to judge what manner of regulation may best be employed" to accomplish its ends. *Id.* at U.S. 480. The Court had decided in *Ohralik* that face-to-face solicitation by lawyers presented too great an opportunity for overreaching and, thus, justified a prophylactic rule prohibiting such solicitation altogether. Yet, the majority in *Shapero* denied the State the right to regulate the format of a letter which emphasized in oversized type that the initial consultation with the lawyer was "FREE," and the enticement that the client "might be surprised" at what the lawyer would be

---

[6] The Respondent and amici argue that the record was devoid of *proof* of an adverse impact upon the administration of justice. However, the problem with *Shapero* and the other *Bates* related cases is that they pronounced, as a matter of law, that the State had an insufficient interest to regulate such things as pitch and style in an attoney advertisement regardless of the effect.

able to do for him. Such solicitation is typical of "loss-leader" advertising used by some commercial establishments to draw customers into a face-to-face meeting where the salesman (or lawyer) is then able to apply precisely the type of face-to-face pressure that justified the regulation in *Ohralik*. Nevertheless, the opinion by the majority in *Shapero* held that the pitch and style of the letter was beyond the State's review, and that such bombastic appeals could "never" meet the *Ohralik* criteria for regulation.

In *Board of Trustees v. Fox, supra* at U.S. 480-481 , the Court emphasized the importance of granting the legislative and executive branches the leeway to exercise reasonable judgements in determining the necessary degree of commercial regulation:

> By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the legislative and executive branches needed leeway in a field (commercial speech) "traditionally subject to governmental regulation." [citing *Ohralik, supra.*]

The majority opinion in *Shapero* was entirely inconsistent with the deference in commercial regulation called for in *Fox* and placed the Court in the position of micro-managing and second guessing the State's regulatory judgment. Instead of granting the States deference, the cases following *Bates* have either denied the States any discretion at all or have imposed upon them a burden

which bears a striking resemblance to clear and convincing evidence. The inconsistency in the Court's application of First Amendment law to professional advertising cases as typified by *Shapero* on the one hand, and to other commercial speech cases as reflected in *Fox* on the other, itself justifies a revisitation of the *Bates* line without posing a threat to the principle of *stare decisis*.

II

THE LIMITS PLACED UPON STATE AUTHORITY BY THE DECISION BELOW EXTEND BEYOND ANY HERETOFORE RECOGNIZED BY THIS COURT AND ESTABLISH ATTORNEY ADVERTISING AS A PRIVILEGED CLASS OF COMMERCIAL SOLICITATION WITH A GREATER DEGREE OF INSULATION FROM REGULATION THAN OTHER CLASSES.

A. The challenged rules meet the requirements for valid commercial regulations because they are narrowly tailored to serve substantial governmental interests.

The Florida Bar argued in its initial brief that, while it was respectfully urging this Court to revisit the *Bates* line of cases, it was unnecessary to do so in order to reverse the decision in the case at bar. The Bar argued that the State has a substantial interest in preserving reasonable standards of personal privacy and tranquility in the community. In support of its position, the Bar cited *Members of City Counsel v. Taxpayers for Vincent*, 466 U.S. 806, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) [allowing regulation of political signs on public property in the interest of aesthetic values]; *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448

(1949) [allowing regulation of sound trucks in the interests of community comfort and convenience]; *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) [allowing a prohibition of picketing in front of a private residence in the interest of privacy] and *Ward v. Rock Against Racism*, 491 U.S. 78, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989) [upholding regulation of music amplification in a public park].

The Respondent and amici do not dispute the fact that the State has a substantial interest in maintaining reasonable standards of personal privacy and tranquility. Instead, they argue that the challenged Florida regulation does not directly and proportionately serve such interest. In support of its argument, the Respondent states that grief is not the gravamen of the challenged rule since the rule applies to any accident, and asserts that it is the Bar's burden to prove that direct mail letters to accident victims "harms them and harms the administration of justice." Brief of Respondents, pp. 13, 14. Amicus Media Institute misstates the Bar's position to be that the State has a substantial interest "in keeping a particular message from certain adults because Petitioner believes they cannot handle the message." Brief of the Media Institute, *et al*, p. 9. The essence of these arguments is that, in order to sustain its rule, Florida must prove that every personal injury victim who receives a direct solicitation letter is in a state of grief and will be personally offended or otherwise injured by such letter.

In the first place, the Bar is not asserting that the State's interest is in protecting each individual from being harmed by the receipt of such letters. The State's interest is in maintaining a reasonable community standard of

privacy and personal tranquility. This was precisely the interest that justified regulations in *Taxpayers for Vincent, Kovaks, Frisby,* and *Ward.* The Respondent attempts to distinguish those cases by noting that the sound trucks and loudspeakers emitted "loud and raucous noises," that the sign ordinance was designed to "preserve urban aesthetics," and that the Court emphasized the "offensive and disturbing nature of the form of communication" when it permitted regulation of residential picketing. Brief of Respondent, p. 19. In these respects, however, the cited cases are actually indistinguishable from the case at bar.

As with the residential picketing, Florida's rule is directed at the "offensive and disturbing nature of the form of communication." In *Kovaks, Taxpayers,* and *Ward* the States did not seek to prove, and obviously could not practicably have proved, that each person who viewed the political signs or heard the loudspeakers or music was offended or otherwise adversely affected by them. What those cases approved was State enforcement of reasonable community standards of privacy, tranquility, and aesthetics. Similarly, in the case at bar, the State cannot practicably formulate any rule that will restrict direct solicitation letters only as to those accident victims who are grieving and who would find such letters offensive. In addition, any more subjective rule would leave both the advertising lawyer and the disciplinary arm of the Bar in confusion as to when a letter became a violation in any given instance.

The Respondent and amici cite the language of *Central Hudson* holding that a commercial regulation shall be "no more extensive than necessary" to serve the State's

interest. For the reasons noted above, the Florida rule is, in fact, the least restrictive workable regulation that would serve the State's interests. Furthermore, the Respondent and amici, in citing the language of *Central Hudson,* failed to note the Court's explination of the language a year later in *Board of Trustees v. Fox, supra.* In that case the court recognized the "difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires," and emphasized that its language in *Central Hudson* was not intended to imply that the least restrictive means test was applicable to commercial speech. The Court stated:

> What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas,* 478 U.S. at 341, 106 S.Ct. at 2977 – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," *In re R.M.J., supra,* 455 U.S. at 203, 102 S.Ct. at 937; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. *Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.*

[emphasis supplied] The 30-day rule adopted by the Florida Supreme Court represents a reasonable accommodation which serves the State's interest without unduly burdening the lawyer.

B. The challenged rules are valid time, place or manner restrictions.

The Respondent and amicus Media Institute argue that the challenged rules are not content-neutral because they are limited in their application to letters which solicit legal business from persons who were victims of, or are relatives of victims of, personal injury or wrongful death. This Court has not held that content-neutrality is destroyed simply because reference must incidentally be made to the content in order to determine whether or not the class which is regulated is implicated. In *Ward v. Rock Against Racism, supra* at S.Ct. 2754, the Court specifically stated:

> A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [citation omitted] Government regulation of expressive activity is content-neutral so long as it is "*justified* without reference to the content of the regulated speech."

[emphasis by Court] In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Court upheld an ordinance which restricted the showing of sexually explicit motion pictures to limited geographical areas. The ordinance necessitated review of a film's content in order to determine whether it contained sexually explicit material and thus subjected it to the ordinance. The Court upheld the ordinance because it was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theatres on the surrounding community." *Id.* at U.S. 47.

[emphasis by Court] The Court found that the City Counsel's "*predominate* concerns" were with the secondary effects of adult theatres, and not with the content of adult-films themselves. The fact that the City Counsel might also have been motivated by other factors which, by themselves, would not have passed constitutional muster was held to be irrelevant.

The challenged Florida rule serves two separate state interests, each of which is *justified* without reference to the content. First, as noted above, the State seeks to preserve a reasonable standard of personal privacy and tranquility on behalf of its citizens. It is not concerned with the message contained within the letters, which an attorney is free to deliver after the thirty-day period or at any time by other advertising media, but with the mode of delivery and the nature of the recipients. Second, as in *Renton*, the State is concerned about the *secondary effects* of such letters upon the public's perception of the legal profession and our system of justice.

The real argument that Respondent and amici is making, albeit couched in the terminology of content-neutrality, is that the challenged regulation is *under-inclusive* by failing to include all classes that they perceive to be in equal circumstances. This Court has firmly rejected the argument that an under-inclusive regulation is constitutionally suspect. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461 (1955); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 89 S.Ct. 1404 (1969). Indeed, the under-inclusive argument was also advanced and rejected in *Renton* where Court stated:

> That *Renton* chose first to address the potential problems created by one particular kind of adult business in no way suggests that the City has "singled out" adult theatres for disciminatory treatment. [Id. at U.S. 53].

The challenged Florida rule meets each of the elements of a valid time, place or manner restriction and should be upheld on that basis alone if no other.

Respectfully submitted,

BARRY RICHARD
GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
904/222-6891
Counsel of Record

WILLIAM F. BLEWS, President
The Florida Bar

JOHN A. DEVAULT III,
President-Elect
The Florida Bar

No. 94-226

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF ALABAMA STATE BAR ASSOCIATION, ARKANSAS BAR ASSOCIATION, ATLANTA (GA) BAR ASSOCIATION, BROOKLYN (NY) BAR ASSOCIATION, THE COLORADO BAR ASSOCIATION, DADE COUNTY (FL) BAR ASSOCIATION, DELAWARE STATE BAR ASSOCIATION, ESSEX COUNTY (NJ) BAR ASSOCIATION, STATE BAR OF GEORGIA, ILLINOIS STATE BAR ASSOCIATION, THE IOWA STATE BAR ASSOCIATION, JACKSONVILLE (FL) BAR ASSOCIATION, KANSAS BAR ASSOCIATION, KENTUCKY BAR ASSOCIATION, STATE BAR OF MICHIGAN, THE MISSISSIPPI BAR, MONROE COUNTY (NY) BAR ASSOCIATION, STATE BAR OF MONTANA, BAR ASSOCIATION OF NASSAU COUNTY, N.Y., INC., NEW HAMPSHIRE BAR ASSOCIATION, NEW JERSEY STATE BAR ASSOCIATION, OHIO STATE BAR ASSOCIATION, SOUTH CAROLINA BAR, SUFFOLK COUNTY (NY) BAR ASSOCIATION, TENNESSEE BAR ASSOCIATION, STATE BAR OF TEXAS, UTAH STATE BAR, AND WEST VIRGINIA STATE BAR, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

JAMES L. BRANTON, President
State Bar of Texas
711 Navarro Street
737 Travis Park Plaza Building
San Antonio, Texas 78205
(210) 224-4474

Counsel of Record for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

Alabama State Bar Association
Broox G. Holmes, President
P.O. Box 671
Montgomery, AL 36101

Arkansas Bar Association
Robert L. Jones, III, President
P.O. Box 2023
Fort Smith, AZ 72902-2023

Atlanta (GA) Bar Association
T. Jackson Bedford, Jr., President
2500 The Equitable Bldg.
100 Peachtree St.
Atlanta, GA 30303

Brooklyn (NY) Bar Association
Miriam Cyrulnik, President
123 Remsen St.
Brooklyn, NY 11201-4212

The Colorado Bar Association
Frances A. Koncilja, President
1700 Broadway, # 2050
Denver, CO 80290

Dade County (FL) Bar Association
Francisco R. Angones, President
123 N.W. First Ave. #214
Miami, FL 33128

Delaware State Bar Association
R. Franklin Balotti, President
F. Michael Parkoswki
116 W. Water St.
Dover, DE 19901

Essex County (NJ) Bar Association
Floyd Shapiro, President
One Newark Center, 16th Floor
Newark, NJ 07102

State Bar of Georgia
Harold Turner Daniel, Jr., President
1201 W. Peachtree St., N.W.
Suite 3100
Atlanta, GA 30309

Illinois State Bar Association
David A. Decker, President
Dennis A. Randleman, General Counsel
424 South Second St.
Springfield, IL 62701

The Iowa State Bar Association
Nicholas V. Critelli, Jr.
Hedo Zacherle
Fifth Floor, 317 Sixth Ave.
Des Moines, IA 50309

Jacksonville (FL) Bar Association
Henry M. Coxe, III, President
424 E. Monroe St.
Jacksonville, FL 32202

Kansas Bar Association
Linda S. Trigg, President
304 North Lincoln
Liberal, KS 67901

Kentucky Bar Association
Stephen D. Wolnitzek, President
P.O. Box 352
Covington, KY 41012-0352

State Bar of Michigan
Jon R. Muth, President
Marcia L. Proctor, General Counsel
306 Townsend St.
Lansing, MI 48933-2083

The Mississippi Bar
W. Scott Welch, III, President
Michael B. Martz, General Counsel
P.O. Box 22567
Jackson, MS 39225

Monroe County (NY) Bar Association
C. Bruce Lawrence, President
One Exchange St.
5th Floor
Rochester, NY 14614-2098

State Bar of Montana
Robert J. Phillips, President
201 West Main, Suite 104
Missoula, MT 59802

Bar Association of Nassau County, N.Y., Inc.
Grace D. Moran, President
Benedict J. Pollio, Chair of Committee on Advertising
Chris G. McDonough Committee on Advertising
6900 Jericho Turnpike
Syosset, NY 11791

New Hampshire Bar Association
Jack P. Crisp, Jr., President
112 Pleasant St.
Concord, NH 03301

New Jersey State Bar Association
William B. McGuire, President
One Constitution Sq.
New Brunswick, NJ 08901-1500

Ohio State Bar Association
Albert L. Bell General Counsel
1700 Lake Shore Dr.
Columbus, OH 43204

BEST AVAILABLE COPY

South Carolina Bar
J. Rutledge Young, Jr.,
President
950 Taylor St.
Columbia, SC 29202

Suffolk County (NY) Bar
Association
John H. Gross, President
560 Wheeler Road
Hauppauge, NY 11788-4357

Tennessee Bar Association
Harris A. Gilbert, President
3622 West End Ave.
Nashville, TN 37219

Utah State Bar
John C. Baldwin,
Executive Director
Steven Trost, Chief
Disciplinary Counsel
645 South 200 East, # 310
Salt Lake City, UT 84111

West Virginia State Bar
Barbara L. Baxter,
President
2006 Kanawha Blvd., E.
Charleston, WV 25311

Counsel for Amici Curiae

INTEREST OF AMICI CURIAE

The various state and local bar associations which join in this amici brief have a cumulative membership which totals in excess of 300,000 attorneys. Each association either has some degree of responsibility for regulating lawyer advertising, or possesses a unique perspective on the effects of the current restrictions regarding the regulation of attorney advertising as experienced in their various activities involving the public and their own members.

Those bars with a regulatory role in lawyer advertising have direct knowledge as to the effects of unrestricted lawyer advertising, as permitted by *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and its progeny, on the administration of justice, the provision of legal services in their states, and the public. The experience of these associations includes the drafting of pertinent disciplinary rules, the enforcement of those measures with respect to many and varied lawyer communications, and the receipt of commentary on attorney advertising in the context of particular client or citizen complaints.

The other bar associations appearing herein – because of their member and public opinion surveys, lawyer referral service reports, and other authoritative information sources – can further attest to the effects of lawyer advertising on citizen confidence in our judicial system, and on public perception regarding the current level of professionalism within their particular legal communities.

These interests are present and continuing, and will likely be affected by any decision of this Court in the instant case.

Letters of consent to file this brief have been lodged with this Court pursuant to Supreme Court Rule 37.

SUMMARY OF ARGUMENT

The bar associations joining in this brief urge this Court to return to the states the authority to regulate lawyer advertising which existed prior to this Court's opinion in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), for the reasons that:

1) unrestrained lawyer advertising has severely eroded the public's respect for our system of justice and in the legal profession; and

2) amici's experience over the past 17 years has demonstrated that the state bars and the courts are incapable of insuring, without substantial restraints not permissible under current authority, that the commercial advertisement of legal services will not be inherently misleading to the public.

ARGUMENT

The bar associations joining in this brief support the position of The Florida Bar in the instant case and urge the Court to reexamine its decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) so as to grant to the states greater latitude to regulate lawyer advertising consistent with other forms of commercial advertising.

The collective experience of the bar associations joining in this brief in dealing with the regulation of lawyer advertising in the past 17-plus years has made prophetic the observations of Justice Powell that the *Bates* holding "seriously understates the difficulties, and overestimates the capabilities of the bar – or indeed of any agency public or private – to assure with a reasonable degree of effectiveness that price advertising can at the same time be both unrestrained and truthful." *Bates*, 433 U.S. at 396 (Powell, J., concurring in part and dissenting in part).

As Justice Powell noted, the recognition of First Amendment protections for attorney advertising would "effect profound changes in the practice of law, viewed for centuries as a learned profession." *Id.* at 389.

Notwithstanding *Bates* and all its progeny, this issue "nonetheless remains a serious enforcement problem," *Id.* at 395, in need of further consideration by this Court.

CONCLUSION

The Court is urged to revisit its decision in *Bates* and broaden the authority of the States to regulate commercial advertising by lawyers.

Respectfully submitted,

JAMES L. BRANTON, President
State Bar of Texas
711 Navarro Street
737 Travis Park Plaza Building
San Antonio, Texas 78205
(210) 224-4474

Counsel of Record for Amici Curiae

NOV 8 1994
OFFICE OF THE CLERK

No. 94-226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

LARRY S. STEWART, ESQ.
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of Trial Lawyers of America

JEFFREY ROBERT WHITE, ESQ.*
CHERYL FLAX-DAVIDSON, ESQ.
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
Attorneys for Amicus Curiae
**Counsel of Record*

BEST AVAILABLE COPY

22pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICUS CURIAE*..... *1*

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. FLORIDA RULE 4-7.4(B) IS A CONSTITUTIONAL RESTRICTION ON COMMERCIAL SPEECH. 4

A. The States May Regulate Attorney Commercial Speech in Furtherance of a Substantial State Interest. 4

B. Florida's Rule Strikes a Reasonable Balance Between the State's Interest in Regulating Attorney Commercial Speech and the Scope of the Restriction. 7

1. Florida's Rule Serves Substantial State Interests in Preserving the Fairness of the Civil Justice System to Litigants. 7

2. Empirical Evidence Shows that the Challenged Regulation Advances Florida's Substantial Interests. 11

3. The Scope of the Regulation is in Proportion to the Interest Served. 14

II. THE 30-DAY MORATORIUM IS A REASONABLE TIME, PLACE, AND MANNER RESTRICTION..... 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989) 10

Bates v. State Bar, 433 U.S. 350 (1977) 5

Board of Trustees v. Fox, 492 U.S. 469 (1989) 14

Borkoski v. Yost, 594 P.2d 688, 694 (Mont. 1979) 10, 11

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 7, 11, 14

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 16

Doe v. Hafen, 772 P.2d 456 (Utah App. 1989) 11

Edenfield v. Fane, 113 S. Ct. 1792 (1993) 7, 11

In re R.M.J., 455 U.S. 191 (1982) 5

McHenry v. The Florida Bar, 21 F.3d 1038 (11th Cir. 1994) 4, 14, 16

New York Public Interest Research Group, Inc. v. Insurance Information Inst., 531 N.Y.S.2d 1002 (Sup. Ct. 1988) .. 10

Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978) 6, 7, 15

Quinn v. Aetna Life and Cas. Co., 409 N.Y.S.2d 473 (Sup. Ct. 1978) 9

Shapero v. Kentucky Bar Assoc., 486 U.S. 464 (1988) 4, 6

Ward v. Rock Against Racism, 491 U.S. 78 (1989) 16

Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985) 5, 11

Other Authorities

Academy of Florida Trial Lawyers' Comments in Support of Proposed Florida Bar Regulations on Attorney Advertising 11, 12, 13

ABA Code of Professional Responsibility (1976) 5

Frank N. Magid Associates, "Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys" (Dec. 1987) (the "Survey") 11

Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 Am. U.L. Rev. 1637 (1993) 9

Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1 (Oct. 1990) 8

John DeWitt, *Report of Findings: Nevada lawyers' Advertising Survey*, 55 Inter Alia 11 (Apr. 1990) 13

Theodore Eisenberg and James A. Henderson, *Inside the Quiet Revolution in Products Liability*, 39 U.C.L.A. L. Rev. 731 (1992) 9

Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 Ga. L. Rev. 633 (1994) 8

Mark Galanter, *News From Nowhere*, 71 Denv. L. Rev. 101 (1993) 8

Valerie Hans, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law and Soc'y Rev. 85 (1992)..... 10

James A. Henderson and Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A.L. Rev. 479 (1990) 9

Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68 (Jan. 1979)..... 10

Stephanie M. Myers, Allan B. Padderud, and Anthony J. Ferri, *A Survey of Jurors' Attitudes Toward Attorney Advertising*, 56 Inter Alia 11 (July, 1991)..... 13, 14

Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort System -- And Why Not?*, 104 U. Pa. L. Rev. 1147 (1992) 9

Tort Reformers Say Advertising Pays, Even in Texas, Liability Week, Feb. 10, 1992..... 10

John W. Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*,, 24 Houston L. Rev. 81 (1987)..... 9

Richard Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141 (1988)..... 9

IN THE

Supreme Court of the United States

October Term, 1994

No. 94-226

THE FLORIDA BAR,
Petitioner,

v.

G. STEWART McHENRY, WENT FOR IT, INC.
and JOHN T. BLAKELY,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in support of petitioner The Florida Bar. Letters from both parties granting consent to the filing of this brief have been filed with this Court.

ATLA is a voluntary national bar association whose approximately 60,000 trial lawyers primarily represent injured plaintiffs in civil actions. For this reason, ATLA members are vitally interested in assuring that those who have been injured in accidents or disasters have access to information concerning the availability of legal services. However, injured plaintiffs depend upon the integrity of the judicial process, particularly the impartiality of jurors, for a fair and just adjudication of their legal claims. For this reason, ATLA is also concerned that the means of soliciting clients by attorneys not undermine that integrity and impartiality.

In ATLA's view, certain types of solicitation engender cynicism with respect to the public's estimation not only of the legal profession, but also the civil justice system and the credibility of plaintiffs who pursue civil claims. These members of the public sit as jurors in personal injury and wrongful death cases.

ATLA has therefore supported efforts by the bar to regulate attorney solicitation of clients in a manner which reduces the potential harm of some typed of solicitation without depriving the public of valuable information.

SUMMARY OF THE ARGUMENT

If lawyers sold cars, or computers or corn futures, this would not be a troublesome case. This Court has extended First Amendment protection to commercial speech, including the advertising of prices and availability of routine legal services. But this Court has also consistently reaffirmed the authority of the states to regulate commercial speech by attorneys. Moreover, the Court has recognized that solicitation by attorneys implicates important state interests.

This Court has held that a state may regulate commercial speech in furtherance of a substantial state interest, by means which advance that interest in a direct and material way, and where the restriction on protected speech is a reasonable "fit" in proportion to the interests served.

Preserving the integrity of the judicial system and the impartiality of jurors are clearly substantial state interests. Experience with advertisements by advocates of "tort reform" demonstrates that adverse public perceptions of the civil justice system and of personal injury lawyers can taint the verdicts of jurors in personal injury cases. Bias and skepticism against personal injury plaintiffs on the part of potential jurors may also be a result of negative reaction to unrestrained attorney solicitation of clients from among recent victims of accident or disaster. Preserving the right of litigants to a fair and impartial jury is clearly a substantial state interest.

Florida's 30-day ban on targeted direct mail solicitation of accident victims and their families materially advances this state interest. Empirical studies in both Florida and Nevada indicate that attorney advertising can have a negative impact on the public's regard for the judicial process. Data also suggests that negative attitudes toward attorneys who advertise may translate into a negative perception of the credibility of plaintiffs who bring injury claims.

The Florida ban is also narrowly tailored to serve this state interest. Based on its investigation and study, the Bar fashioned a rule that affects a particular type of solicitation in a particular circumstance. It does not shut off the flow of information to the public and is limited to a relatively short time period.

Even if targeted direct mail solicitation were fully protected speech, the First Amendment permits the state to enforce reasonable, content-neutral limitations on time and

manner. The Florida ban does not look to the content of the solicitations. Moreover, its limitation on solicitation of accident victims for 30 days is reasonable.

ARGUMENT

I. FLORIDA RULE 4-7.4(B) IS A CONSTITUTIONAL RESTRICTION ON COMMERCIAL SPEECH.

A. The States May Regulate Attorney Commercial Speech in Furtherance of a Substantial State Interest.

At issue before this Court is Florida Rule 4-7.4(b), which establishes a 30-day moratorium on attorneys' use of targeted direct mail to solicit clients in actions for personal injury or wrongful death. The lower court felt constrained by this Court's decision in *Shapero v. Kentucky Bar Assoc.*, 486 U.S. 464 (1988), to hold that the Rule violates the First Amendment. *McHenry v. The Florida Bar*, 21 F.3d 1038, 1043 (11th Cir. 1994). Amicus respectfully disagrees.

In *Shapero*, this Court was not presented with a narrowly drawn regulation, but with a blanket ban on targeted direct mail solicitation by attorneys. The asserted state interests served by the ban were not supported by empirical data. Nor did *Shapero* address the concern that unrestrained solicitation by attorneys might prejudice potential jurors against plaintiffs seeking legal redress for injury. Because these distinguishing factors are present in the case at bar, Amicus submits that Florida's regulation is consistent with this Court's First Amendment precedents.

Although this Court has struck down a number of blanket prohibitions of commercial speech by attorneys, the Court has never indicated that the States may not regulate such speech by carefully drawn regulations. Indeed, in nearly every

decision, the Court explicitly reserved to the States the authority to do precisely that.

This Court extended First Amendment protection to attorney advertising as commercial speech in *Bates v. State Bar*, 433 U.S. 350, 364 (1977). Although the Court struck down a blanket prohibition of advertising of prices for routine legal services, Justice Blackmun, speaking for the majority, emphasized "we, of course, do not hold that advertising by attorneys may not be regulated in any way." *Id.* at 383-84. Indeed, "allowing restrained advertising would be in accord with the bar's obligation 'to facilitate the intelligent selection of lawyers, and to assist in making legal services fully available.'" *Id.* at 377, quoting ABA Code of Professional Responsibility E-C 2-1 (1976).

In re R.M.J., 455 U.S. 191 (1982), invalidated a blanket prohibition against advertising which deviated from an approved list of permissible content. However, the Court pointedly advised that "when the particular content or method of advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." *Id.* at 203. The Court took pains to make clear that the States retain authority in this area:

> We emphasize, as we have throughout our opinion that States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions.

R.M.J. at 207.

By the time the Court decided *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985), Justice White was confident in stating that under the "well settled" approach

of this Court, "blanket bans" on attorney advertising are impermissible, while "rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible." *Id.* at 638.

Similarly, *Shapero* ruled that "merely because targeted, direct-mail solicitation presents lawyers with an opportunity for isolated abuses or mistakes does not justify a *total ban* on that mode of protected commercial speech." *Shapero* at 476 (emphasis added). Nevertheless, the "State can regulate such abuses and minimize mistakes through far less restrictive and more precise means." *Id.*

One situation in which the Court has upheld a ban is that of in-person solicitation of clients. *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (1978). The Court explicitly recognized that personal injury victims are especially vulnerable.

> [T]he potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive.

Id. at 465.

Amicus suggests that these concerns are also present, if to a lesser degree, where the solicitation takes the form of a personalized letter targeted to an injured person shortly after the accident or disaster. In such circumstances, "the State has a strong interest in adopting and enforcing rules of conduct

designed to protect the public from the harmful solicitation by lawyers whom it has licensed." *Id.* at 464.

In determining whether a state's regulation is consistent with the limited First Amendment protection accorded commercial speech, this Court has invariably looked to the balancing test it formulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980). That test looks to the state's interest in restricting speech, whether the regulation advances that interest, and whether the restriction is sufficiently narrow. Amicus submits that the Florida rule passes muster under that test.

B. Florida's Rule Strikes a Reasonable Balance Between the State's Interest in Regulating Attorney Commercial Speech and the Scope of the Restriction.

The Court recently applied the *Central Hudson* test in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) to Florida's ban on telephone solicitation by Certified Public Accountants. Justice Kennedy described the Court's inquiry:

> [U]nder the test set forth in *Central Hudson* we must ask whether the State's interests in proscribing [the solicitation] are substantial; whether the challenged regulation advances these interests in a direct and material way; and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served.

Id. at 1798.

1. Florida's Rule Serves Substantial State Interests in Preserving the Fairness of the Civil Justice System to Litigants.

The Florida Bar asserts that its 30-day moratorium on attorney targeted direct-mail solicitation (1) protects persons

traumatized by recent injury to themselves or family members from overreaching or undue influence by attorneys during the period of greatest vulnerability, and (2) protects the personal privacy and tranquility of recently injured persons or their loved ones. See Brief of Petitioner.

Amicus agrees that these are substantial State interests. However, Amicus seeks to direct the Court's attention to an additional consideration that informed the Florida Bar's regulation: The danger that adverse perception of personal injury attorneys engendered by unrestrained solicitation of clients may prejudice injured plaintiffs in the eyes of potential jurors.

Ethical Rule 4-7.4(b) is specifically directed at attorney solicitation of clients in personal injury or wrongful death cases. It is not news that the torts system has become the subject of an intense lobbying and public relations campaign by the liability insurance industry and corporate interests who seek to diminish the right to compensation for wrongful injury. Advocates of such "tort reform" claim that the civil justice system is in a "crisis." Often these attacks blame "greedy" trial lawyers stirring up litigation. *See generally*, Mark Galanter, *News From Nowhere*, 71 Denv. L. Rev. 101 (1993)(critical examination of the claim that an oversupply of lawyers is the cause of litigation). Indeed, the former President and Vice President of the United States made attacks on trial lawyers an important part of their campaign for reelection in 1992. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 Ga. L. Rev. 633, 652 (1994)(quoting George Bush and Dan Quayle).

The tort reform lobbying effort has been sharply criticized by scholars as an exercise in "public relations, propaganda, and the mobilization of prejudice and fear," Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 13 (Oct. 1990); an

example of "raw interest group politics" employing "smokescreens and false alarms," Richard Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1148 & 1164 (1988); as well as "intentional misrepresentation," John W. Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 Houston L. Rev. 81, 96 (1987). *See especially*, Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 Am. U.L. Rev. 1637 (1993).

Empirical evidence overwhelmingly demonstrates that the claims of a litigation crisis are false. *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort System -- And Why Not?*, 104 U. Pa. L. Rev. 1147 (1992); James A. Henderson and Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A.L. Rev. 479 (1990)

Nevertheless, a significant portion of the public has accepted them, primarily and directly as a result of the successful advertising and public relations effort of the "tort reform" advocates. Theodore Eisenberg and James A. Henderson, *Inside the Quiet Revolution in Products Liability*, 39 U.C.L.A. L. Rev. 731, 740 (1992). What is crucially relevant to this case is that these adverse perceptions of the civil justice system generally, and of trial lawyers in particular, *translate directly into juror bias against personal injury plaintiffs*. *Id.* at 791-95.

Courts have had to face this problem of tort reformers "poisoning the jury pool" through advertisements attacking the tort system. One court found that "the advertisements are geared toward influencing jurors and potential jurors in their decisionmaking process." *Quinn v. Aetna Life and Cas. Co.*, 409 N.Y.S.2d 473, 480 (Sup. Ct. 1978). Similarly, the Supreme Court of Montana found that "it is undeniable that

the purpose of the advertisements was to reduce the amount of damages awarded by a jury." *Borkoski v. Yost*, 594 P.2d 688, 695 (Mont. 1979). *See also Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989).

There is evidence that adverse public perception of the tort system does indeed translate into adverse perception of tort claimants. One court pointed out that the purpose of "lawsuit crisis" ads

> may well be to encourage readers and viewers, as potential jurors, to decrease plaintiffs' recoveries by awarding lower verdicts. Voir dire of jurors in civil cases now frequently includes questions directed to this advertising campaign, and *a large number of potential jurors indicate both that they are aware of and influenced by the advertisements.*

New York Public Interest Research Group, Inc. v. Insurance Information Institute, 531 N.Y.S.2d 1002, 1012 & n.12 (Sup. Ct. 1988)(emphasis added).

Empirical research into the impact of such advertising found that "even a single exposure to one of these ads can dramatically lower the amount of award a juror is willing to give." Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68, 69 (Jan. 1979). *See also*, Valerie Hans, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law and Soc'y Rev. 85, 109 (1992)(anti-plaintiff attitudes among surveyed tort jurors associated with tort reform campaign); *Tort Reformers Say Advertising Pays, Even in Texas*, Liability Week, Feb. 10, 1992, at 1.

Advertising which has such a prejudicial effect on potential jurors clearly implicates a substantial state interest:

> When insurance companies inject the issue of insurance into the consciousness of every potential juror through a high priced advertising campaign, as has been illustrated in this case, they threaten every plaintiff's right to an impartial jury.

Borkoski v. Yost, 594 P.2d 688, 694 (Mont. 1979). *Accord, Doe v. Hafen*, 772 P.2d 456, 458 (Utah App. 1989).

Amicus suggests that similar concerns are raised by adverse public reaction to attorney solicitation of clients from among recent victims of accidents or disasters. Experience with "tort reform" advertisements suggests that perception of trial lawyers as overly aggressive in obtaining clients may "rub off" on plaintiffs in the eyes of some jurors.

2. Empirical Evidence Shows that the Challenged Regulation Advances Florida's Substantial Interests.

The second prong of the *Central Hudson* test looks to whether the regulation materially advances the State's substantial interest. The State's burden to justify its restriction "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield* at 1800, citing *Zauderer* at 626. It is clear from *Edenfield* that the State can demonstrate the need for its restriction through studies or anecdotal evidence.

Prior to promulgating Rule 4-7.4(b), the Florida Bar undertook hearings in which the results of extensive evidence-gathering documented that unrestricted lawyer advertising had severely reduced public confidence in the administration of justice and, as a result, was undermining the foundation of the civil justice system. *See Academy of Florida Trial Lawyers' Comments in Support of Proposed Florida Bar*

Regulations on Attorney Advertising at 5. Armed with evidence that this perceived problem was, in fact, a real one, the Bar crafted a rule that was designed to minimize this harm yet offer the least interference with the "free flow of commercial information."

A report by the Academy of Florida Trial Lawyers noted that in a poll of state circuit court judges, 82.5% of Florida's circuit judges who responded felt that lawyer advertising had an impact on the public's confidence in the administration of justice and virtually all indicated that the impact had been negative. Academy of Florida Trial Lawyers, *Comments, supra,* at 5. In that same poll, 23% of the judges surveyed indicated that potential jurors, witnesses, or parties had expressed opinions concerning advertising by lawyers during a part of the trial. *Id.* at 8.

The Florida Bar also had before it a study entitled "Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys" (the "Survey"), prepared for the Bar by Frank N. Magid Associates in December 1987. This study showed evidence that direct mail advertising may result in less positive attitudes toward the legal profession and the judicial process. For example, in the direct mail recipients' survey, respondents were asked to indicate if they thought there would be any chance that the fact they had received an advertisement or solicitation by mail from a lawyer would influence the way they felt about lawyers or the trial should they be asked to serve on a jury in a civil case. A majority (83%) said they would be impartial jurors. Still, 11% -- over one person on every 12-person jury, if randomly distributed -- admitted that receiving direct mail advertising from an attorney would influence the way they feel about the lawyers in the trial on which they served. Persons surveyed stated that they would be concerned about the competence and honesty of advertising attorneys and the legitimacy of the case.

Among direct mail recipients, more than a quarter (27%) claimed that their regard for the legal profession and the judicial process was "lower" as a result of receiving a direct mail advertisement or solicitation from an attorney. *Survey* at 11. "[P]erhaps the most serious concern uncovered in this research is that the receipt of direct mail advertising may influence the decisions of potential jurors." Florida Academy of Trial Lawyers, *Comments* at 11.

The danger posed by attorney solicitation to the impariality of the jury system was buttressed by a study commissioned by the Nevada Lawyers' Advertising Study Commission in January 1990. John DeWitt, *Report of Findings: Nevada lawyers' Advertising Survey*, 55 Inter Alia 11 (Apr. 1990). About 38% of respondents indicated that advertising they had seen or heard had affected their respect for the legal system in a negative way. The study also revealed that a substantial number of people said they would be affected as jurors if they recognized one of the lawyers in a trial from seeing or hearing that lawyer in a television or radio ad. While most, 73%, said they would not be affected, 15% said they would be affected unfavorably, and 2% said they would be affected favorably. Most disturbingly, 8% -- nearly one person in twelve -- stated that their actual decision as jurors would be affected by the attorney's advertising. *Id.* at 17.

A subsequent study of attitudes toward attorney advertising held by jurors serving in personal injury and medical malpractice trials in Southern Nevada reinforces this finding. Stephanie M. Myers, Allan B. Padderud, and Anthony J. Ferri, *A Survey of Jurors' Attitudes Toward Attorney Advertising*, 56 Inter Alia 11 (July, 1991). While most jurors had positive attitudes toward attorneys, 63% held a negative view toward attorney advertising. *Id.* at 14. Jurors in cases where plaintiff's attorney advertised on television rated the plaintiff's evidence significantly lower than jurors in

cases where plaintiff's attorney did not. They also rated the defense lawyer's presentation and credibility significantly higher than jurors whose plaintiff's attorney was not a television advertiser. *Id.* at 15.

Amicus respectfully submits that this evidence indicates that Rule 4-7.4(b) would reduce at least one source of prejudice on the part of potential jurors against personal injury plaintiffs. The Rule thus directly and materially advances the State's substantial interest in affording a fair and impartial jury to civil litigants.

3. The Scope of the Regulation is in Proportion to the Interest Served.

In considering this final inquiry under *Central Hudson*, this Court must determine whether the regulation at issue constitutes a reasonable "fit" in light of the interest served by the state. *Board of Trustees v. Fox*, 492 U.S. 469 (1989).

Amicus argues that Florida's Rule is a reasonable means of regulating attorney commercial speech given the substantial interests at stake. The Eleventh Circuit recognized that the means chosen to advance the government interest in regulating commercial speech need only be

> a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

21 F.3d at 1042, *citing Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

Amicus suggests this 30-day moratorium is carefully tailored to halt what the public might perceive as a particularly distasteful practice -- direct mail solicitation targeted to recently injured or bereaved persons -- without shutting off the flow of important information to those who may be in need of legal services.

The rule only prohibits such solicitation during a relatively short period of time during which victims are likely to be most vulnerable. It does not restrict other types of advertising or communication of information about available legal services.

More importantly, if such solicitation is subject to regulation at all, some lines must be drawn. For example, a mere 24-hour moratorium would clearly be reasonable, unless this Court is prepared to hold that any such moratorium is *per se* unconstitutional. Whether the restriction should be for one day or thirty or somewhere in between is a determination best left to the state bar, based on familiarity with conditions in the state as well as its own inquiry and factfinding with respect to the harms and benefits to the consumers of legal services there. [1]

Amicus submits that Ethics Rule 4-7.4(b) furthers a substantial state interest in preserving the fairness of the civil justice system and jury impartiality, that empirical evidence

---

[1] In response to the argument that within this 30-day period an individual is in the greatest need of legal counsel because of an onslaught of claims agents or adjusters of prospective defendants or their insurers attempting to solicit releases, Amicus strongly advocates that other professions similarly enact a 30-day moratorium. "Where lay agents or adjusters are involved, these practices for the most part fall outside the scope of regulation by the organized Bar; but releases or settlements so obtained [should be] viewed critically by the courts." *Ohralik v. Ohio State Bar*, 436 U.S. 459 n. 16.

shows that the Rule directly furthers that interest, and that it is reasonably proportional to the interest served. The Rule clearly satisfies the test enunciated by this Court in *Central Hudson*, and therefore comports with the First Amendment.

II. THE 30-DAY MORATORIUM IS A REASONABLE TIME, PLACE, AND MANNER RESTRICTION.

Even speech that is fully protected by the First Amendment is subject to valid time, place, and manner restriction. The lower court acknowledged that States may place restrictions on the time, place, and manner of constitutionally protected communication if they do so: (1) without regard to the content of the communication, (2) in a manner narrowly tailored to serve a significant governmental interest, and (3) leaving open alternative channels for communication. 21 F.3d at 1044, *citing Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

Contrary to the characterization by the lower court, Amicus suggests that Florida's moratorium on attorney solicitation is content-neutral. The operative factor under the rule is not the content of the solicitation letter but whether the recipient of the mailing or his or her relative was involved in an accident or disaster less than thirty days prior to the mailing. Rule 4-7.4(b).

"Government regulation of expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 78 (1989) (emphasis by Court). This is the case here. The Rule does not care what the attorney states in the solicitation letter; it is the very act of soliciting clients from among the recently injured or bereaved that the bar seeks to prevent.

Moreover, the Rule is narrowly tailored to apply only for a limited time during which injured persons may be most vulnerable, and it does not prevent attorneys from disseminating information to potential clients through the wide variety of other avenues of communication.

Amicus submits that a 30-day moratorium on targeted, direct mail solicitation of individuals known to have a specific legal problem is a narrowly drawn and reasonable means of advancing important state interests which does not absolutely restrict the free flow of information. By its Rule, Florida has struck a proper and delicate balance between access to important consumer information and the societal interest in protecting the public and safeguarding our jury system.

CONCLUSION

For the foregoing reasons, Amicus urges this Court reverse the decision of the lower court and hold Florida Rule 4-7.4(b) constitutional.

Respectfully submitted,

Jeffrey Robert White
Cheryl Flax-Davidson
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
Attorneys for Amicus Curiae

November 8, 1994

Supreme Court, U.S.
FILED
NOV 8 1994
OFFICE OF THE CLERK

No. 94-226

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE FLORIDA BAR

Petitioner,

v.

G. STEWART MCHENRY;
WENT FOR IT INC.; AND
JOHN T. BLAKLEY,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Amicus Curiae Brief of the Dade County Trial Lawyers Association and The American Board of Trial Advocates In Support of the Petitioner's Brief on the Merits

ROBERT D. PELTZ
8300 N.W. 53rd Street
Miami, Florida 33130
(305) 477-6400

Counsel for Amicus Curiae

JOSEPH A. GLICK
President DCTLA

ROBERT C. BAKER
President ABOTA

ROBERT G. VIAL
Pres. Elect ABOTA

November 8, 1994

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

BEST AVAILABLE COPY

21 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE 30 DAY WAITING PERIOD SET FORTH IN RULE 4-7.4 CONSTITUTES A REASONABLE RESTRICTION LIMITED TO THE TIMING OF DIRECT MAIL SOLICITATION WHICH IS SUPPORTED BY A SUBSTANTIAL STATE INTEREST 5

CONCLUSION 17

TABLE OF AUTHORITIES

Cases — Page

Bates v. State of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) 2, 3, 4, 5, 7

Central Hudson Gas v. Pub. Serv. Comm'n, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) 16

Edenfield v. Fane, _U.S._, 113 S. Ct. 1792, 123 L.Ed. 2d 543 (1993) 14

Friedman v. Rogers, 440 U.S.1. 99 S. Ct. 887, 59 L.Ed.2d 100 (1979) 15

Goldfarb v. Virginia State Bar, *421 U.S. 775, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975)* 7, 14

In re R.M.J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed.2d 64 (1982) 15

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) 6, 15

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d. (1985) .. 4, 15

Other Authorities

Peltz, *Legal Advertising - - Opening Pandora's Box, 19 Stetson L.Rev. 43 (1989)* 8, 9, 14

Rule 4-1.6(b), Rules Regulating The Florida Bar 7

Rule 4-3.1, Rules Regulating The Florida Bar 7

Rule 4-3.3, Rules Regulating The Florida Bar 7

Rule 4-3.4, Rules Regulating The Florida Bar 7

Rule 4-7.4, Rules Regulating The Florida Bar 2, 17

IN THE
SUPREME COURT OF THE UNITED STATES
October Term,1994

THE FLORIDA BAR,

Petitioner,

v.

G. STEWART MCHENRY;
WENT FOR IT, INC.; AND
JOHN T. BLAKELY

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE DADE COUNTY TRIAL LAWYERS ASSOCIATION AND THE AMERICAN BOARD OF TRIAL ADVOCATES IN SUPPORT OF THE FLORIDA BAR'S BRIEF ON THE MERITS

STATEMENT OF INTEREST

The Dade County Trial Lawyers Association (DCTLA) is a voluntary organization of over 400 attorneys, who specialize in plaintiffs' personal injury trial practice in Dade County, Florida.

The American Board of Trial Advocates(ABOTA) is a national organization whose members include 4,200

trial lawyers, judges, and other public officials. ABOTA's members are vitally concerned with the preservation and improvement of the present civil justice system in the United States. A major purpose of the organization is to promote the fair and efficient administration of justice for the benefit of individual litigants and the general public.

In representing the group of individuals, who would be most affected by the subject advertising regulation, the DCTLA and ABOTA file this Amicus Curiae brief with the consent of the parties, in support of the Florida Bar's position and urge this Court to reverse the Circuit Court's opinion striking down the 30 day waiting period set forth in Rule 4-7.4 of the Rules Regulating the Florida Bar. As indicated herein, both the DCTLA and ABOTA believe that there is an urgent need for this regulation and that it clearly falls within the constitutional parameters set forth by this Court in its prior decisions.

SUMMARY OF ARGUMENT

Although expressing its deep concern over many of the problems created by attorney advertising following this Court's decision in *Bates*, the Eleventh Circuit concluded that it was bound by the *Bates* line of cases to strike Florida's 30 day waiting period for direct mail solicitation. Even though it found "the Florida Bar's attempt to regulate such intrusions entirely understandable," the Eleventh Circuit concluded that the *Bates* line of cases require states to rely upon voluntary self restraint in this area.

Contrary to the Eleventh Circuit's plea for such voluntary self-restraint, experience has shown that such pleas are generally ignored, giving rise to the need for

mandatory action by state licensing authorities. Perhaps even more importantly, however, the Circuit Court's opinion misreads this Court's prior decisions, which do not prevent states from regulating attorney advertising, so long as there is sufficient evidence in the record supporting the need for such regulations to protect a substantial state interest and the regulation is narrowly tailored to remedy the particular abuses involved.

In fashioning its advertising rules, Florida heeded the lessons of *Bates*. Rather than attempting to justify over- broad restrictions on advertising by relying upon nebulous concepts of professional dignity, The Florida Bar instead undertook a detailed and comprehensive two year study of attorney advertising, which identified particular problems that needed to be addressed and then carefully crafted its regulations to remedy the specific problems identified as a result of its study.

In the process, the Florida Bar developed a strong empirical record, which included numerous scientifically conducted surveys, polls and studies, that not only clearly identified particular advertising problems, but which also provides objective evidence supporting the need for Florida's specific advertising restrictions, including the one involved in the subject case.

In addition to the numerous Florida surveys and studies available to the Bar, it also looked to a number of similar surveys performed in other states, particularly Iowa and Nevada, which reached similar results and conclusions. During its study, the Florida Bar was also faced with considerable anecdotal evidence of the damage caused by direct mail solicitation following several tragic mass disasters which occurred

in the state during this time period.

The comprehensive and well documented efforts of the Florida Bar to first identify and then remedy specific advertising abuses stands in stark contrast to the total lack of effort found in many of the other cases in which this Court has stricken advertising restrictions.

This Court has previously recognized that the interest of states in regulating attorneys is especially great, because of their essential role in the primary government function of administering justice. Likewise, this Court has also made it clear that while truthful advertising related to lawful activities is entitled to constitutional protection, that states may impose appropriate restrictions where experience has proved that in fact a particular method of advertising has been subject to abuse.

In considering the appropriateness of such restrictions, this Court has distinguished between outright advertising prohibitions as in *Bates* and mere regulations in the manner and mode of presentation as in the present case. In many ways, the Florida Rule in question is even less intrusive than the disclosure regulations allowed in *Zauderer*, since it does not effect in any manner the content of the advertising, merely its timing.

Regardless of which standard the Court finds applicable, the strong empirical record developed by the Florida Bar is clearly sufficient under the prior decisions of this Court to uphold the constitionality of the subject regulation.

ARGUMENT

I.

THE 30 DAY WAITING PERIOD SET FORTH IN RULE 4-7.4. CONSTITUTES A REASONABLE RESTRICTION LIMITED TO THE TIMING OF DIRECT MAIL SOLICITATION WHICH IS SUPPORTED BY A SUBSTANTIAL STATE INTEREST

Although the Eleventh Circuit struck Florida's 30 day waiting period for direct mail solicitation, the Court clearly recognized the compelling need for this regulation. While the Circuit Court noted that it felt constrained to take this action in light of this Court's prior decision in *Bates v. State of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), it unmistakenly expressed its reluctance to follow down this path by going on to observe:

> Justice Powell predicted in *Bates* that recognizing First Amendment protections for attorney advertising would "effect profound changes in the practice of law, viewed for centuries as a learned profession." [Citations omitted.] That prediction has proven true. Unfortunately, the resulting changes have not necessarily been for the better. We are disturbed that *Bates* and its progeny require the decision we reach today. We are forced to recognize that there are members of our profession who would mail solicitation letters to persons in grief, and we find The Florida Bar's attempt to regulate such intrusions entirely

> understandable. Although the Bar may not formally restrict such behavior, an attorney's conscience, self-respect, and respect for the profession should dictate self-restraint in this area. To preserve the law as a learned profession demands as much.

McHenry v. The Florida Bar, 21 F.3d 1038, 1045 (11th Cir. 1994) (emphasis added).

Contrary to the Eleventh Circuit's well intentioned plea for voluntary self-restraint in this area, experience has shown that such pleas are generally ignored giving rise to the need for mandatory action by state licensing authorities. As pointed out by Justice O'Connor in her dissent in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 490, 108 S.Ct. 1916, 100 L.Ed 2d 475 (1988):

> [i]mbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession.
>
> ...Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other.

> ...[T]his Court's recent decisions reflect a myopic belief that "consumers," and thus our nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. (emphasis added).

Perhaps even more importantly, however, the Circuit Court's opinion fails to grasp the essential difference between the legal profession and other "learned" ones. Unlike other professions, attorneys form an indispensable and integral component in the functioning of the judicial system, which is the core of our democracy. Thus, attorneys do more than just represent clients--they are "officers of the court" in all senses of the title. *E.g. Goldfarb v. Virginia State Bar*, 421 U.S. 775, 792, 95 S.Ct. 2004, 44 L.Ed. 2d 572(1975). As such, they carry legal and ethical obligations, which often exceed their own interests and at times, even transcend the interests of their clients. See Rules 4-1.6(b), 4-3.1, 4-3.3 and 4-3.4, Rules Regulating the Florida Bar. Therefore, when citizens lose confidence in attorneys as a profession, more than just attorneys' "dignity" is involved. As the empirical evidence developed by the Florida Bar clearly shows, this public loss of confidence in the legal profession translates into a direct loss of confidence in the fair and impartial functioning of our judicial system itself.

In fashioning its advertising rules, Florida heeded the lessons of *Bates* and its progeny. Rather than attempting to justify over broad restrictions on advertising by relying upon nebulous concepts of professional dignity, like the State of Arizona in *Bates*, the Florida Bar instead undertook a detailed and comprehensive two year study of attorney advertising, which identified particular problems that needed to be addressed and then carefully crafted its regulations to remedy the specific problems identified as a result of its

study. In the process, the Florida Bar developed a strong empirical record, which included numerous scientifically conducted surveys, polls and studies, that not only clearly identified particular advertising problems, but which also provides objective evidence supporting the need for Florida's specific advertising restrictions, including the one involved in the subject case, in order to combat the specific problems identified.[1]

One of the earliest scientific studies relied upon by the Florida Bar was a 1987 survey entitled "Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys," conducted by Frank N. Magid Associates. This study contained both a survey of the attitudes of the general population toward direct mail solicitation and a second component limited to actual recipients of direct mail solicitations. Of this latter group, 80% indicated that they did not believe that the advertisement was totally truthful, while 45% found that they were designed to appeal to gullible or unstable people. A majority expressed the further opinion that direct mail advertising promoted unwarranted and frivolous law suits, which in turn produced higher legal costs for everyone.

Most ominously, however, 27% of those surveyed said that their regard for the legal profession and the judicial process had been adversely affected by their receipt of direct mail solicitations. Even more importantly, however, 11% of the respondents admitted that direct mail advertising produced such concerns about the honesty of the legal profession that it could

---

[1] These studies and surveys are discussed in more detail in Peltz, *Legal Advertising - - Opening Pandora's Box*, 19 Stetson L.Rev. 43 (1989).

A summary of these surveys and studies, which accompanied the Florida Bar's proposed rules to the Florida Supreme Court, was also introduced in the trial Court below.

importantly, however, 11% of the respondents admitted that direct mail advertising produced such concerns about the honesty of the legal profession that it could influence the way they would feel about lawyers or litigants, if they were to serve as jurors in a civil trial. Since most people are unwilling to express the highly unpopular and undesirable opinion that they could ever be biased jurors, the survey concluded that the number of people actually holding this opinion was therefore undoubtedly much higher.

Thus, the study concluded that not only did direct mail solicitation generally create negative feelings toward the soliciting attorney, but even more importantly that such solicitation creates significant negative feelings in the general public toward both the legal system as a whole and the entire judicial process. The significance of these findings is that the damage caused by direct mail solicitation is not limited to merely impugning the dignity of the profession, but carries over to the functioning of the jury system and the general public's confidence in the entire judicial system. *See* Peltz, *supra* note 1, at 116-17.

Another Florida study relied upon by the Florida Bar, but commissioned by the Academy of Florida Trial Lawyers, the statewide plaintiff's trial bar, reached remarkably similar results. In Kitchens & Associates, "Lawyer Advertising Polling Survey (1988)," 64% of the general public polled statewide expressed a favorable impression of attorneys in general, compared to 27% unfavorable and 10% undecided. On the other hand, 69% of the public held an unfavorable view of lawyers who advertise compared to 23% favorable and 8% undecided. More importantly, however, the survey also found that this high negative rating for television advertisers affects the remainder of the legal profession, since "it makes all lawyers appear to be unethical..." and thereby undermines their role in the administration of our justice system.

Accordingly, the survey concluded:

> As the following data clearly indicates the legal profession has been damaged by the advertising of legal services. While advertising may be an effective marketing tool for some law firms, the communication is creating a negative image for all lawyers...
>
> One persuasive impact of lawyer advertising is to lower the credibility of lawyers. The source of the credibility problem is not competency, but a lack of an empathy, ie: not representing the best interests of the client. They believe lawyers who advertise... are more interested in money than in the problems of the client. Thus the perceived intentions of lawyers are questioned and the resulting image is a self-serving one similar to that of used car salesmen--someone out to make money by taking advantage of others.

Kitchens & Associates, *Lawyer Advertising Polling Survey* (1988), 3, 6-7.

Further empirical evidence was provided by the "Florida Circuit Judges Questionnaire," which was a 1988 survey of 261 state trial judges. This survey is particularly telling, since the trial judges who made up the pool have perhaps the best vantage point to observe the effects of attorney advertising on the administration of justice from a first hand basis, due to their opportunity to actually sit through voir dire and all of the other aspects of hundreds of trials each year. Over 78% of these trial judges responded by noting that attorney advertising negatively impacted upon the public confidence in the administration of justice. Twenty-three percent of the judges recounted jurors,

witnesses or parties expressing an opinion concerning attorney advertising during some part of a trial that they had presided over.

The Bar also utilized a second study commissioned by the Academy of Florida Trial Lawyers, entitled "Civil Jury Study (1989)." Although this six month study was designed to understand and mitigate the effects of anti-lawyer propaganda, it necessarily examined the effects of attorney advertising on the general public as part of its analysis. This survey echoed the same results as the others, in that 68% of those surveyed complained that much of the negative feeling directed to the legal profession was the belief that individuals are encouraged to bring more law suits than they should, which in turn has caused a rise in insurance rates for everyone else.

These feelings were further explored through various focus groups conducted in Miami and Orlando, involving potential jurors. Among the conclusions reached as part of this portion of the study was that the public equates attorney advertising with responsibility for causing many unfounded, superfluous and frivolous law suits:

> "Lawyer advertising contributes mightily to their negative image. The advertising is self promoting, ambulance chasing, debasing, and unprofessional."

AFTL, *Civil Jury Study (1989), 2.*

Other similar empirical data was generated by three additional Florida surveys entitled "Media Pre-Test and Post Test Surveys," "A Study of Florida Bar Public Service Announcements" and "Television Advertising by Attorney's and an Evaluation of its Impact on the Public." This latter study also included a survey of proposed bar rules and concluded that

> there was consistent support for each element of the proposed rules. . .evidenced by a high majority of respondents. . . These findings indicate a strong pattern of popular support for the proposed regulations. Each proposed rule had a demonstrable impact in remedying respondent reactions to advertising elements they found objectionable.

Moore, *Television Advertising by Attorneys: An Evaluation of its Impact on the Public (1989), 28.*

Despite the breath and comprehensive nature of the various Florida surveys and studies available to the Bar, its research was not limited by the borders of this state. The Bar also looked to a number of surveys performed in Iowa, which had subsequently adopted even more restrictive advertising guidelines. These studies included a pair of surveys by Frank N. Magid Associates, entitled "Attitudes and Opinions Toward Advertising for Law Firms" and "Consumer Attitudes Toward Yellow Pages Legal Advertising," which reached similar conclusions to the numerous Florida studies.

Additional empirical data was also provided by a Nevada study entitled "Attorney Advertising: The Effect on Juror Perceptions and Verdicts." In this survey, 63% expressed negative opinions toward television advertising, while only 39% felt that such advertising helped to inform people of their legal rights or to assist them in choosing an attorney. Even more remarkable, however, was the finding that 83% of the respondents favored the defense in cases where the Plaintiff was represented by an advertiser, compared to only 40%, where the Plaintiff was represented by a non-advertiser. None of the potential explanations for this tremendous discrepancy does much to advance the cause of attorney advertising.

During its study, the Florida Bar also was faced with considerable anecdotal evidence of the havoc to the public's already weakened perception of the legal profession caused by direct mail solicitation following several tragic mass disasters in the state. Direct mail solicitation in these cases unleashed an avalanche of highly critical editorials and news articles across Florida. Virtually every major newspaper in the state complained that accident victims, bereaved spouses and parents, and other victims of misfortune were being inundated with letters from Florida attorneys, while local police departments were being paralyzed by lawyers' demands for copies of accident reports.

Some statewide newspaper headlines appearing during the course of the Bar study period included:

> "Scavenger Lawyers" (Miami Herald, September 29, 1987).
>
> "Law Firm Sends Wreath After Baby's Death" (Pensacola News-Journal, July 17, 1987).
>
> "Take Action on Ghoulish Attorneys" (Fort Lauderdale Sun Sentinel, September 16, 1987.)
>
> "Ambulance Chasing Lawyers Have No Place in Profession"
> (The Florida Times-Union, September 28, 1987.)
>
> "Soliciting by Lawyers Drawing Criticism" (St. Petersburg Times, September 26, 1987).
>
> "Chasing Ambulances-Solicitations Give Lawyers a Black Eye" (Bradenton Herald July 15, 1987).

> "Bus Crash Survivors Hounded by Lawyers" (Fort Lauderdale Sun Sentinel, September 16, 1987).

Peltz, *supra* note 1, at 116. These represent only the briefest sampling of the overwhelming deluge of articles and columns recounting numerous horror stories of direct mail solicitation following tragedies during the period preceding the adoption of Florida's present advertising rules.

The comprehensive and well documented efforts of the Florida Bar to first identify and then remedy specific advertising abuses stands in stark contrast to the total lack of effort demonstrated by the Florida Board of Accountancy in *Edenfield v. Fane*, _ U.S. _, 113 S.Ct. 1792, 123 L.Ed. 2d 543 (1993). As observed by this Court in *Edenfield*, the accounting board offered no "empirical data," "studies," or even "any anecdotal evidence, either from Florida or another state that validates the Board's suppositions." Id. at 1800. Instead, the Board relied exclusively upon the affidavit of one of its former chairmen, "which contained nothing more than a series of conclusory statements. . ." Id. at 1801.

Thus, the attempt to regulate the solicitation involved in *Edenfield* failed because of the total absence of any evidentiary record to support the existence of a causal relationship between the subject regulation and the state interest it was intended to remedy and not because of the lack of a substantial state interest. Clearly such an evidentiary record exists in the present case.

Because of their essential role in "the primary government function of administrating justice," this Court has previously recognized that "[t]he interest of the States in regulating lawyers is especially great. . ." *Goldfarb*, 421 U.S. 792. As a result,

> . . . special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

Shapero, 486 U.S. 489 (O'Connor, J., dissenting).

This Court summarized its prior attorney advertising decisions in *In re R.M.J*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed 2d 64 (1982), by holding that while truthful advertising related to lawful activities is entitled to constitutional protection,

> . . . when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. (emphasis added).

Also see *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed. 2d 100 (1979).

In considering the "appropriateness" of such restrictions, this Court has also distinguished between outright advertising prohibitions as in *Bates* and mere regulations on the manner and mode of presentation as in the present case. For example, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, n.14, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), this Court rejected the contention that mandatory disclaimers and disclosures of additional information must necessarily be judged by the same constitutional standards used to determine whether the advertisement could be regulated in the first instance. Since these disclaimers and disclosures did not constitute an outright ban of the advertising involved, this Court instead required only that they be

"reasonably related" to the state's legitimate interest in preventing the deception of its citizens.

In many ways, the Florida rule in question is even less intrusive than the disclosure regulations involved in *Zauderer*, since it does not effect in any manner the content of the advertising, merely its timing. Accordingly, a strong argument can be made that the Florida Bar need only show a "reasonable relationship" between the subject rule and any legitimate state interest. Nevertheless, the strong empirical record developed by the Florida Bar in promulgating its proposed rules is clearly sufficient under the prior decisions of this Court to easily meet the even stricter standard applied in *Central Hudson Gas v. Public Service Comm.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980).

CONCLUSION

The Dade County Trial Lawyers Association and The American Board of Trial Advocates respectfully urge this Court to reverse the decision below and declare Rule 4-7.4(b) of the Rules Regulating the Florida Bar valid. The DCTLA and ABOTA further join the additional request of the Florida Bar urging this Court to revisit the *Bates* premise and broaden the discretion of the States in the regulation of attorney advertising.

Respectfully submitted,

Robert D. Peltz, Esquire

CANNING, MURRAY & PELTZ, P.A.
8300 N.W. 53rd Street
Trenton Bldg., Suite 300
Miami, Florida 33130
Tel: (305) 477-6400
Counsel for Amicus Curiae

Joseph A. Glick, President
Dade County Trial Lawyers
Association

Robert C. Baker, President
American Board of Trial Advocates

Robert G. Vial, President
Elect, American Board of Trial Advocates

No. 94-226

SUPREME COURT, U.S.
FILED
NOV 6 1994
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

v.

G. STEWART McHENRY, WENT FOR IT, INC., a Florida Corporation, JOHN T. BLAKELY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NEW YORK STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

G. ROBERT WITMER, JR., ESQ.
President, New York State Bar Association
One Elk Street
Albany, New York 12207
(518) 463-3200
Counsel of Record

(Of counsel attorneys listed inside front cover)

BEST AVAILABLE COPY

Of Counsel:

ROBERT J. PEARL, ESQ.
400 Andrews Street, Suite 210
Rochester, New York 14604

SHARON STERN GERSTMAN, ESQ.
50 Delaware Avenue
Buffalo, New York 14202

KATHLEEN R. MULLIGAN BAXTER, ESQ.
One Elk Street
Albany, New York 12207

BEST AVAILABLE COPY

No. 94-226

In the

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

v.

G. STEWART McHENRY, WENT FOR IT, INC., a Florida Corporation, JOHN T. BLAKELY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NEW YORK STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the New York State Bar Association ("NYSBA"), is a voluntary bar association primarily composed of members of the bar of the State of New York. The NYSBA has approximately 56,000 members, including lawyers who are engaged in the practice of law in the private and public sectors, as well as judges, professors and law students, and is the largest

voluntary state bar association in the United States.

The NYSBA seeks to promote rules concerning advertising by attorneys which are fair and equitable, and which encourage the development of such advertising as would provide the public with meaningful information concerning the availability and provision of legal services. This case provides this Court with an opportunity to give guidance to bar associations and regulatory authorities which seek to implement advertising rules, and is therefore of great interest to the members of the NYSBA.

SUMMARY OF ARGUMENT

Since the decision of this Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), entities with authority over the regulation of attorney conduct have sought to regulate lawyer advertising in an effort to protect the public from improper influence and to protect the image of the legal profession. It is the position of the NYSBA that *Bates* and subsequent cases do not provide regulatory authorities with clear guidance as to permissible regulation of lawyer advertising, and the NYSBA urges this Court to provide a clear statement of what constitutes appropriate time, place or manner regulation of lawyer advertising.

ARGUMENT

Since the decision of this Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), state bar associations and other entities with jurisdiction over lawyer conduct have attempted to regulate advertising for reasons ranging from protection of the image of the profession to protection of the public from improper influence. Many of these attempts have resulted in a striking of such regulations by this Court, *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990); *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of*

Ohio, 471 U.S. 627 (1985); *In the Matter of R.M.J.*, 455 U.S. 191 (1982);or by lower federal courts, *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Tex. 1994) and the instant case.

As a result of the *Bates* decision and subsequent cases, regulatory authorities have been provided with numerous examples of impermissible restrictions on lawyer advertising, but have not been provided with a clear statement of what would constitute appropriate time, place or manner restrictions on lawyer advertising. As a result, advertising which is considered by many to be sensational, exploitive or devoid of any meaningful information has proliferated. It is the NYSBA's belief that such advertising has contributed, at least in part, to the public's eroding faith in the justice system and to the public's negative impression of the legal profession.

The NYSBA believes that the public interest would be well served by the development of a clear statement regarding time, place and manner restrictions on lawyer advertising which also protects attorneys' First Amendment rights relating to such advertising. The NYSBA currently is undergoing a study of appropriate measures to reduce advertising with little or no informational purpose, and is anxious for the assistance of this Court in that regard.

CONCLUSION

This Court has a unique opportunity to give guidance to bar associations and regulatory authorities which have enacted or are considering enactment of regulations relating to lawyer advertising. The NYSBA urges this Court to fully consider the issue of lawyer advertising and solicitation and provide a clear statement of appropriate time, place or manner restrictions on lawyer advertising.

November 8, 1994

Respectfully submitted,

G. ROBERT WITMER, JR., ESQ.
President, New York State Bar Association
One Elk Street
Albany, New York 12207
(518) 463-3200
Counsel of Record

Of Counsel:

ROBERT J. PEARL, ESQ.
400 Andrews Street, Suite 210
Rochester, New York 14604

SHARON STERN GERSTMAN, ESQ.
50 Delaware Avenue
Buffalo, New York 14202

KATHLEEN R. MULLIGAN BAXTER, ESQ.
One Elk Street
Albany, New York 12207

No. 94-226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE PETITIONER AND SUGGESTING REVERSAL

C. Rufus Pennington, III
(Counsel of Record)
Margol & Pennington, P.A.
76 South Laura Street Suite 1702
Jacksonville, Florida 32202
(904) 355-7508

Counsel for Amicus Curiae
The Academy of Florida Trial Lawyers
F. Gregory Barnhart, President
The Academy of Florida Trial Lawyers

BEST AVAILABLE COPY

21 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 9

APPENDIX 10

TABLE OF AUTHORITIES

PAGE(S)

CASES

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) .....passim

In re Amendment to the Code of Professional Responsibility (Contingent Fees), 349 So.2d 630 (Fla. 1977).....3

In re R.M.J., 455 U.S. 191 (1982).....6

Regents v. Bakke, 438 U.S. 265 (1978).....7

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 7

Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988) 3, 7, 8

The Florida Bar v. Schreiber, 407 So.2d 595 (Fla. 1981)...5, 6

The Florida Bar re Amendment to the Code of Professional Responsibility, 494 So.2d 960 (Fla. 1986).....5

The Florida Bar re Rules Regulating the Florida Bar, 494 So.2d 977 (Fla. 1986).....6

Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).....6

No. 94-226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF PETITIONER AND SUGGESTING REVERSAL

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Academy of Florida Trial Lawyers ("the Academy") respectfully files this *amicus curiae* brief pursuant to Rule 37.3 of the Rules of this Court.[1]

[1] The letters of the parties expressing their consent have been filed with the Clerk of the Court.

The Academy is a voluntary association of approximately four thousand Florida attorneys specializing in trial practice. The Academy was founded by the leading trial lawyers of the State of Florida, and continues to include among its membership those lawyers recognized as the preeminent trial attorneys in our state. The great majority of our members are engaged in the representation of plaintiffs in civil actions for personal injury and wrongful death.[2] The Academy is, for all practical purposes, the organized plaintiff's trial bar of the State of Florida. As such, we represent lawyers who may be more directly affected by issues of constitutional protection for attorney solicitation and advertising than the petitioner or Florida lawyers generally.[3]

As a result of the disastrous consequences of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny, we wholeheartedly endorse The Florida Bar's attempts to regulate attorney advertising and solicitation; and we urge the Court to accept the Bar's invitation to reconsider the wisdom of *Bates*.

SUMMARY OF ARGUMENT

Turn on a television on any afternoon in any city or town in the nation, or open the yellow pages of any telephone book anywhere in the country, and one will see what the *Bates* decision has done to our judicial system. We urge the

---

[2] The Academy's goals as stated in its Charter are, *inter alia*, to promote public safety and welfare while protecting individual liberties; to assure that the courts of the State of Florida remain accessible to every person for the redress of any injury and that the right to trial by jury remains inviolate; and to uphold the honor and dignity of the profession of law. Article II, Sections 1(g), (h), (e), Charter of the Academy of Florida Trial Lawyers.

[3] Petitioner The Florida Bar is an official arm of the Supreme Court of Florida, and is composed of all lawyers admitted to practice in Florida.

Court to reexamine the issue of First Amendment protection for attorney advertising and solicitation, and to adopt a more appropriate constitutional analysis. Respectfully, that constitutional analysis should recognize that attorneys serve as an integral part of the judicial branch of government; that advertising and solicitation activities by lawyers uniquely affect the institution of the judiciary; and that, to preserve and protect public confidence in the administration of justice, it is essential that the States be permitted to regulate lawyer advertising.

ARGUMENT

The Florida experience with attorney advertising presents a case study of how *Bates*, "an early experiment with the doctrine of commercial speech," *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 487 (O'Connor, J., dissenting), has gone terribly awry. *Bates* was initially received by the Florida judiciary and bar, if not with enthusiasm, then at least with a measure of optimism. In 1977, the Supreme Court of Florida expressed its hopes about competition fostered by attorney advertising:

> Although the full implications of the recent decision of the United States Supreme Court in *Bates* have yet to manifest themselves, the approval of lawyer advertising therein should result in a greater awareness in the public concerning attorneys' services and fees. Thus the 'open marketplace' competition promoted by such broader dissemination of information, in and of itself, should tend to be a self-regulating factor in the establishment of fees.

In re Amendment to Code of Professional Responsibility (Contingent Fees), 349 So.2d 630, 632 (Fla. 1977) (citation omitted). The decision in *Bates* was grounded in part on the

expectation that open competition for clients, stimulated by lawyer advertising, would result in greater access to the legal system. *Bates*, 433 U.S. at 277 ("where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising.")

In dissent, Justice Powell warned that,

> [T]oday's holding will be viewed by tens of thousands of lawyers as an invitation -- by the public-spirited and the selfish lawyers alike -- to engage in competitive advertising on an escalating basis.

Bates v. State Bar of Arizona, 433 U.S. 350, 377 (Powell, J., dissenting in part). The *Bates* majority allayed these concerns by predicting that:

> [M]ost lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of the profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward.

Bates, 433 U.S. at 379.

It soon became apparent, however, that this premise of *Bates* was indeed naive. When lawyer advertising became constitutionally protected "commercial speech," the trained advocates of our most competitive profession were invited to stoop to the values of the marketplace. Many accepted the invitation. As lawyer advertising rapidly degenerated into today's exploitative carnival, the public's level of confidence in the bar plummeted. Moreover, the profession of the law is integrally associated with (and, at least under Florida law, is

an official part of) the judicial branch of government. Put more bluntly, from the public's point-of-view, judges are lawyers with robes. The unfortunate long term result of attorney advertising, as borne out by the record in this case, was that the public's perception of the integrity of the judicial branch of government was marred.

As lawyer advertising was eating away at the public's confidence in the judiciary, it was failing to affect fees through increased competition. *See The Florida Bar re Amendment to the Code of Professional Responsibility*, 494 So.2d 960, 961 (Fla. 1986). Specifically with respect to contingent fees in personal injury matters, lawyer advertising did not have the effect anticipated by the *Bates* majority. By 1986, although there was "no hard evidence that the contingent fee system [was] being abused," the Florida Supreme Court felt it necessary to regulate contingent fees due exclusively to the public *perception* of abuse. *Id.* Not only had advertising failed to reduce the level of contingent fees, it undoubtedly was the major cause of this public perception that the judicial system was a vehicle of abuse by advertising lawyers.

While attorney advertising in Florida produced little if any demonstrable good and a great deal of palpable bad, it was still thought that the state supreme court had the authority to prohibit outright solicitation of potential clients. As recently as 1981, the Supreme Court of Florida held that targeted direct mail solicitation was subject to disciplinary action and was not protected by the First Amendment. *The Florida Bar v. Schreiber*, 407 So.2d 595 (Fla. 1981). Expressing concerns that solicitation by mail would be nearly as pernicious as in-person solicitation, the court stated:

> We do not perceive that a citizen receiving a letter written on stationery carrying an attorney's letterhead would be bold enough to discard it after only a casual perusal. Read it

> he must, for letters from attorneys carry a special aura of respect because of the state's power that attorneys can invoke, and the attorney's words carry a corresponding sense of authority.

The Florida Bar v. Schreiber, 407 So.2d 595, 598 (Fla. 1981).

However, even before *Schreiber* was overruled by *Shapero*, this Court's decisions in *In re R.M.J.*, 455 U.S. 191 (1982), and *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), called into question the State's authority to prohibit solicitation through the mails. In the wake of those decisions, the supreme court felt constrained to modify Florida's disciplinary rules to regulate, rather than to proscribe, direct mail solicitation. Accordingly, in 1986, the Supreme Court of Florida adopted a rule specifically authorizing the direct solicitation of prospective personal injury clients by mail. *The Florida Bar re Rules Regulating the Florida Bar*, 494 So.2d 977, 978 (Fla. 1986). Almost immediately upon adoption of the rule, reports of alleged abuses of direct mail solicitation began to occur. Within the year, the public outcry had reached a level that the president of The Florida Bar appointed a Special Committee on Solicitation to investigate the rapidly accumulating number of alleged abuses. As reported by the committee:

> Within six months after the rule became effective, newspapers throughout the state began to report that accident victims, bereaved spouses and parents, and other victims of misfortune were being inundated with the mailed importunings of Florida lawyers. Newspapers also reported that police departments were being burdened by lawyers' demands for copies of accident reports and that some lawyers were engaged in illegal and unethical solicitation in-person, by telephone and through agents.

Final Report of the Special Committee on Solicitation of The Florida Bar (1987) (see the appendix to this brief).[4]

In response to this report, The Florida Bar began an in-depth two year study of the impact of attorney advertising and solicitation.[5] Before the study was completed, however, the Court decided *Shapero v. Kentucky Bar Association*, firmly establishing an attorney's First Amendment right to engage in targeted direct mail solicitation of potential clients as a matter of federal constitutional law. The Florida court was therefore severely limited in its ability to deal with the widespread complaints related to lawyer solicitation through the mails.

By the late 1980's, the ultimate effects of *Bates* and its progeny had become clear to all. The plaintiff's trial bar in Florida had reached a consensus that, except for the financial rewards reaped by a small group of practitioners, the extension of constitutional protection to attorney advertising and solicitation had proved a complete failure. There was no meaningful benefit to the citizens of our State. The only competition fostered by *Bates* appeared to be a contest to determine the most "effective" television commercials. One could predict, with morbid certainty, that a volley of

---

[4] Although the committee's report is not a matter of record in this case, it is closely analogous to factual data relied upon and cited by the Court in other cases. *See, e.g., Regents v. Bakke*, 438 U.S. 265 (1978); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 56-57 n.111 (1973).

[5] The results of this study are in the record.

lugubrious letters from lawyers would await the victim of any tragedy involving injury or death.

Even if potential clients were viewed as mere "consumers" of legal services, the bombardment of grotesque television commercials, the mind-numbing array of page after page of yellow page advertisements and the intrusive "personalized" letters sent to grieving accident victims could only serve to confuse those in need of representation. Worse, the commercial peddling of litigation that *Bates* and its progeny allowed, indeed affirmatively encouraged, had clearly left the public disgusted with the judicial system.

In 1994, the dissents in *Bates* have proved prescient indeed. Respectfully, today it would take an even greater naiveté than displayed by the *Bates* majority for this Court to conclude that lawyer advertising and solicitation have not tainted the judicial system, along with the lawyers who serve that branch of government. As a more recent dissenter has written,

> In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

Shapero v. Kentucky Bar Association, 486 U.S. 466, 491 (O'Connor, J., dissenting).

We endorse The Florida Bar's suggestion that an "institutional speech" analysis would provide a far more appropriate framework in this context than does a "commercial speech" analysis. However, whatever analysis might be deemed most suitable, the important point is that the States should be left with a reasonable measure of authority to regulate attorney advertising and solicitation.

CONCLUSION

The Academy of Florida Trial Lawyers, *amicus curiae*, respectfully urges the Court to reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

C. Rufus Pennington, III
(Counsel of Record)
Margol & Pennington, P.A.
76 South Laura Street Suite 1702
Jacksonville, Florida 32202
(904) 355-7508

Counsel for Amicus Curiae
The Academy of Florida Trial Lawyers

F. Gregory Barnhart, President
The Academy of Florida Trial Lawyers

APPENDIX

SPECIAL COMMITTEE ON SOLICITATION
FINAL REPORT

Summary of recommendations: Targeted direct mail solicitation should be abolished; new restrictions should be imposed on general direct mail advertising; forfeiture of fees should be added to the Bar's disciplinary arsenal for cases establishing improper solicitation; and The Florida Bar should file an amicus brief in *Shapero v. Kentucky Bar Association*, which is pending before the United States Supreme Court and which challenges an absolute ban on targeted direct mail solicitation.

Background

The Special Committee on Solicitation was created in July and charged with the task of investigating reported improper or abusive solicitation by some members of The Florida Bar and with recommending measures to curb such misconduct. Specifically, the Committee was charged with determining:

1) Whether the Rules of Professional Conduct regulating solicitation conform to the mandate of the caselaw;

2) What time, place and manner restrictions are authorized or permitted by decisions of the United States Supreme Court;

3) What types of abuses, if any, have emerged in Florida;

4) What other states have done to regulate solicitation by lawyers; and

5) What amendments, if any, to the Rules and commentary are necessary and appropriate to conform the Rules to the mandate of the United States Supreme Court; to curb identified abuses; or to ensure that the public is protected

from coercion, overreaching, deception or invasions of privacy on the part of soliciting lawyers.

In performance of this task the Committee has reviewed the caselaw, other states' regulatory efforts, newspaper accounts of improper solicitation and written comments and complaints submitted by members of the Bar and the public. In addition, the Committee conducted public hearings in four cities in October to receive comments from members of the Bar and the public. On October 5, the day before the first of these public hearings, the United States Supreme Court granted certiorari in *Shapero v. Kentucky Bar Association*.

In its 1986 order adopting the Rules Regulating The Florida Bar, the Florida Supreme Court lifted the absolute ban on direct mail solicitation effective January 1, 1987. The court concluded that the ban was inconsistent with recent pronouncements of the United States Supreme Court. The Florida court stated, however, that if regulation of targeted direct mail solicitation, as provided for in Rule of Professional Conduct 4-7.3 (to be renumbered 4-7.4 effective Jan. 1, 1988), proved unworkable or a pattern of abuse was established, the court would consider amending the rule. 494 So.2d 977, 978.

Within six months after the rule became effective, newspapers throughout the state began to report that accident victims, bereaved spouses and parents, and other victims of misfortune were being inundated with the mailed importunings of Florida lawyers. Newspapers also reported that police departments were being burdened by lawyers' demands for copies of accident reports and that some lawyers were engaged in illegal and unethical solicitation in-person, by telephone and through agents.

As one of the first acts of his term, Bar President Ray Ferrero appointed this Committee to ascertain whether Florida

lawyers were in fact abusing Rule 4-7.3 and what measure could be taken to halt any such abuses. The Committee filed an interim report with the Board of Governors at the September Board meeting. The report tentatively identified several amendments to Rule 4-7.3 that would be necessary to curb abuses and protect the public. The report further identified other measures under consideration. After further factfinding, this Committee has concluded that abuses by lawyers and harm to the public is inherent in direct mail solicitation and that, accordingly, the practice should be banned absolutely.

Findings

1) Most lawyers and nonlawyers oppose direct mail solicitation. This finding is supported by views expressed to Ray Ferrero during his speaking engagements before nonlawyer groups around the state, by informal polls of voluntary bar associations and sections of The Florida Bar, by letters to the editors of Florida newspapers, by newspaper editorials and by complaints received by The Florida Bar from lawyers and recipients of solicitation letters.

2) Direct mail solicitation has generated considerable negative publicity and condemnatory editorials for the legal profession and has caused public respect for and confidence in the profession and the court system to plummet. More than one Florida personal injury lawyer has encountered hostility or cynicism on the part of prospective jurors during voir dire, which suggests that innocent plaintiffs with meritorious claims may be injured by direct mail solicitation.

3) Direct mail solicitation infringes on recipients' right to privacy as guaranteed by the Florida

Constitution. This infringement is particularly egregious because it often occurs during periods of emotional stress.

4) Direct mail solicitation cannot be effectively regulated because lawyers have no means of complying with the mandate of Rule 4-7.3 that solicitations not be mailed to anyone whose physical, mental or emotional state is such that they cannot make a reasoned decision whether to hire a lawyer. Similarly, in most instances lawyers have no means of determining whether an intended recipient has already retained counsel in the matter.

5) Complaints from recipients of lawyers' direct mail solicitations demonstrate that such solicitation often causes the recipient emotional distress at a time when the recipient is, by virtue of the misfortune prompting the solicitation, particularly vulnerable.

6) The use of public records to identify individuals with a specific legal problem has burdened law enforcement agencies and has caused distress and unease among targets who did not realize that their identity and their legal problem were open to scrutiny and opportunistic use by strangers.

The Case Law

As a general rule, lawyer advertising that is not false or deceptive and does not concern unlawful activities can be restricted only in the service of a substantial governmental interest and only through the least restrictive means. In 1982 the United States Supreme Court struck down a state's absolute ban on direct mail advertising by lawyers because ***there was no showing that less restrictive regulation would be insufficient*** to serve legitimate interests of the state. *In re*

R.M.J., 455 U.S. 191. The Court has yet to rule on targeted direct mail solicitation. However, the Court has upheld a prophylactic ban on in-person solicitation in circumstances in which fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct are likely to occur. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462. *Ohralik* involved in-person solicitation of accident victims. The Court recognized that in the absence of an absolute ban, in-person solicitation would be virtually immune to effective oversight and regulation.

Some authorities have interpreted *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S.Ct. 2265 (1985), as signaling that an absolute ban on direct mail solicitation of prospective clients known to have specific legal problems will fall. *Zauderer* involved a newspaper advertisement that solicited and gave legal advice to prospective clients who had a particular cause of action. The Court in *Zauderer* distinguished print advertising from in-person solicitation as usually posing much less risk of overreaching or undue influence and as not involving an invasion of privacy. The Court rejected Ohio's arguments for its prophylactic ban on advertisements that solicit and give legal advice because *there was no record to support the ban as necessary* to achieve legitimate interests of the state.

This Committee does not believe that *Zauderer* precludes an absolute ban on targeted direct mail solicitation where a state can demonstrate that less restrictive regulation was tried but failed to effectuate the legitimate interests of the state. In this regard, two observations made by the Court in *Ohralik* with respect to in-person solicitation are applicable to targeted direct mail solicitation: First, the Court noted that the very plight of an unsophisticated, injured or distressed lay person "not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may

distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes." 436 U.S. at 465-466. Second, the Court recognized that "A lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income. A valid claim might be settled too quickly, or a claim with little merit pursued beyond the point of reason. These lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest." 436 U.S. at 461, n. 19.

This Committee is aware that the Supreme Court has held that the government cannot suppress potentially offensive speech if the captive audience has a means of avoiding such speech, and that recipients can avoid objectionable mail by discarding it unopened. *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983). However, the Committee believes that this reasoning is invalid with respect to direct mail solicitation by lawyers. The basis for the Committee's position is that most lawyer solicitations are prompted by some misfortune involving the target, and the public is aware that such solicitations are motivated primarily by the lawyers' interest in the anticipated fees, with the result that the mere presence of a lawyer's solicitation letter in the target's mail box at a time of emotional stress is offensive to the target.

As noted previously, the Court has granted certiorari in *Shapero v. Kentucky Bar Association*, a case that tests the constitutional validity of a prophylactic ban on direct mail solicitation of clients known to have a specific legal problem or cause of action. It is widely expected that Kentucky's rule will fall because there is no record to support its necessity.

This Committee, on the other hand, has compiled a record that demonstrates that many of the same evils inherent in in-person solicitation are inherent in direct mail solicitation. Thus the Committee recommends that The Florida Bar file an amicus brief in *Shapero* in an effort to persuade the United States Supreme Court to limit the reach and effect of its opinion should that opinion be adverse to Kentucky.

Recommendations

1) That the Florida Supreme Court revoke those provisions of Rule 4-7.3 that authorize targeted direct mail solicitation.

2) That general direct mail advertising continue to be permitted, as it was before January 1 under DR 2-104(B) of the Code of Professional Responsibility.

3) That the following requirements (drawn from the Committee's interim report) be adopted for general direct mail advertising:

a) The "advertisement" mark on the envelope and on the communication itself must appear in red and be at least one-fourth inch in size.

b) Direct mail communications may be sent only by regular mail, and not by registered mail, courier or other forms of restricted delivery.

c) The first sentence of the communication must state in capital letters, "If you have already retained a lawyer for this matter, please disregard this letter."

d) Lawyers may not state in direct mail communications that the communications have been approved by the Florida Bar or are permitted by the Florida Bar.

e) Lawyers mailing direct mail communications concerning personal injury law must enclose with their communications a copy of the statement of client's rights set out in rule 4-1.5, but with the signature line deleted. An explanation of the enclosure must be included in the advertisement. these documents are to be of the same type size as the advertisement letter.

f) No contract for representation may be mailed with the advertisement letter.

g) The advertisement must include a statement advising the client who will actually handle the case and/or trial of the matter. The advertisement also must include the statement required by new rule 4-7.3 concerning the availability of a writing setting forth the qualifications and experience of the lawyer or law firm.

4) That the Board of Governors authorize a professional survey of the public to provide additional evidence of the impact of direct mail solicitation on public confidence in the legal profession and the court system and the impact on the administration of justice.

5) That The Florida Bar file an amicus brief in *Shapero v. Kentucky Bar Association.*

6) That the Board of Governors reaffirm that in-person solicitation by lawyers and their agents is both illegal and unethical, and reaffirm The Florida Bar's commitment to seeking both professional discipline and criminal prosecution of lawyers who engage in such practices.

7) That The Florida Bar seek amendment of the Rules of Discipline to authorize forfeiture of fees as an available disciplinary measure when improper solicitation by a lawyer or his agent is established. The amendment should provide that fees forfeited for improper solicitation should be paid over to the Client's Security Fund.

(10)
FILED
DEC 5 1994
OFFICE OF THE CLERK

No. 94-226

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE FLORIDA BAR,
Petitioner,
v.
G. STEWART MCHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE THE MEDIA INSTITUTE, THE FREEDOM OF EXPRESSION FOUNDATION AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN SUPPORT OF RESPONDENTS

Of Counsel:
P. CAMERON DEVORE
GREGORY J. KOPTA
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150

ANDREW AUERBACH
THE MEDIA INSTITUTE
1000 Potomac Street, N.W.
Suite 301
Washington, DC 20007
(202) 298-7512

JOHN J. WALSH *
STEVEN G. BRODY
MARY ELIZABETH TAYLOR
CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, NY 10038
(212) 504-6000
Counsel for Amici Curiae

* Counsel of Record

Counsel continued on inside cover

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

33 pp

DAVID M. HUNSAKER
THE FREEDOM OF EXPRESSION
FOUNDATION
5220 South Marina
Pacifica Drive
Long Beach, CA 90803
(810) 985-8444

ROBERT M. O'NEIL
THE THOMAS JEFFERSON
CENTER FOR THE
PROTECTION OF FREE
EXPRESSION
400 Peter Jefferson Place
Charlottesville, VA 22901
(804) 295-4784

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. PETITIONER HAS NOT MET THE SUBSTANTIAL BURDEN OF PROOF IMPOSED ON WOULD-BE REGULATORS OF COMMERCIAL SPEECH	5
A. Commercial Speech, Including Lawyer Advertising, Is A Valued Part Of The National Discourse And Receives Vigorous Constitutional Protection	5
B. Petitioner Has Failed To Identify A Substantial Interest Or Develop An Evidentiary Record That Satisfies *Central Hudson*	9
1. Petitioner Has Not Identified a Substantial Interest That Justifies Its Restriction	9
a. All Protected Speech Is Endangered by Petitioner's Asserted "Substantial Interest" in Protecting a Purportedly "Vulnerable" Audience from Commercial Messages	9
b. Petitioner Does Not Have a Substantial Interest in Banning Targeted Solicitation Letters, Especially Given Their Value to Lawyers and Their Usefulness to Consumers	11
2. Petitioner Also Failed to Submit Any Evidence to Demonstrate That Its Rule Directly and Materially Advances Its Asserted Purpose of Protecting Personal Privacy and Tranquility	15

TABLE OF CONTENTS—Continued

	Page
3. Petitioner Also Has Not Demonstrated That Its Rule Is Narrowly Tailored to Achieve Its Asserted Purpose	18
II. LAWYER ADVERTISING IS INSEPARABLE FROM COMMERCIAL SPEECH GENERALLY AND MAY NOT RECEIVE REDUCED CONSTITUTIONAL PROTECTION	20
III. PETITIONER'S RULE MEETS NONE OF THE ELEMENTS OF A REASONABLE TIME, PLACE OR MANNER RESTRICTION ON SPEECH	24
CONCLUSION	27

TABLE OF AUTHORITIES

CASES:

	Page
Bates v. State Bar of Ariz., 433 U.S. 350 (1977)	*passim*
Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989)	24
Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1982)	12, 21, 24
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980)	*passim*
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993)	18, 24
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	25
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)	24
Edenfield v. Fane, 113 S. Ct. 1792 (1993)	*passim*
Friedman v. Rogers, 440 U.S. 1 (1979)	24
Ibanez v. Florida Dep't of Business & Professional Regulation, 114 S. Ct. 2084 (1994)	*passim*
In re Anis, 599 A.2d 1265 (N.J. 1991), *cert. denied sub nom.*, 112 S. Ct. 2303 (1992)	19
In re R.M.J., 455 U.S. 191 (1982)	8, 18-19
McHenry v. The Florida Bar, 21 F.3d 1038 (11th Cir.), *cert. granted*, 115 S. Ct. 42 (1994)	*passim*
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)	*passim*
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)	*passim*
Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990)	*passim*
Perry v. Sindermann, 408 U.S. 593 (1972)	22
Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986)	24
R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992)	21
Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988)	*passim*
Sherbert v. Verner, 374 U.S. 398 (1963)	22
Texas v. Johnson, 491 U.S. 397 (1989)	10, 21
The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So.2d 451 (Fla. 1990)	12, 23

TABLE OF AUTHORITIES—Continued

	Page
Turner Broadcasting Sys., Inc. v. F.C.C., 114 S. Ct. 2445 (1994)	7
United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993)	24
Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	5, 6, 23
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	25
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	*passim*
STATUTES:	
Fla. Stat. Ann. § 316.066 (West 1994)	17
Bar and Judiciary Rules, Fla. Stat. Ann. R. 4-7.4(b) (West 1994)	2, 19, 25

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

No. 94-226

THE FLORIDA BAR,
Petitioner,
v.
G. STEWART MCHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE THE MEDIA INSTITUTE, THE FREEDOM OF EXPRESSION FOUNDATION AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

This Brief is submitted on behalf of The Media Institute, The Freedom of Expression Foundation and The Thomas Jefferson Center for the Protection of Free Expression. They submit this Brief to protect the right to disseminate, and the public's right to receive, truthful commercial speech about lawful products and services. All *amici* have a lengthy history of advocacy for strong First Amendment protection for all speech, including truthful, non-misleading commercial messages. *Amici* have individually, or joined by others, participated as

amicus curiae in commercial speech cases before the Supreme Court of the United States, the Courts of Appeals, and the District Courts.

The Media Institute is an independent, non-profit research organization. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, competition within the communications industry, and journalistic excellence.

The Freedom of Expression Foundation is a non-profit corporation, organized in the District of Columbia, which sponsors and conducts research, disseminates information, and seeks to influence policy concerning freedom of expression in communications media.

The Thomas Jefferson Center for the Protection of Free Expression is a non-profit, non-partisan organization in Charlottesville, Virginia, affiliated with the University of Virginia, devoted solely to safeguarding freedom of speech and press in all forms.

SUMMARY OF ARGUMENT

Petitioner asks this Court to reverse 17 years of its jurisprudence protecting lawyers' commercial speech under the First Amendment. That request is deeply troubling under the doctrine of *stare decisis*, and even more so as an attack on the constitutional principle that protects all commercial speech—the principle that our citizens will perceive their own best interests if only commercial speakers are allowed to communicate their truthful, non-misleading messages without governmental interference. Regrettably, Petitioner advocates censorship.

Petitioner's Rule 4-7.4(b) prohibits members of the Florida bar from communicating in writing with potential clients concerning an action for personal injury or wrongful death within the 30 days following the accident or disaster (the "Rule"). Bar and Judiciary Rules, Fla. Stat. Ann. R. 4-7.4(b) (West 1994) ("R. 4-7.4(b)"). Although

the asserted purpose of the Rule is the protection of the personal privacy and tranquility of accident victims or their families, it is clear that Petitioner actually was motivated by the public's general dissatisfaction with lawyers, as reflected by its reliance on an opinion survey taken of Florida adults. Petitioner has done the public a disservice, however, by scapegoating attorney solicitation letters, which are marked in red as an "advertisement" and readily tossed in a wastebasket, as the key to rehabilitating the public's perception of lawyers. Unfortunately, it is easier to target speech than to tackle the real problems with the legal system, such as the oversupply of lawyers, the expense of litigation, the debate concerning contingency fees, and the unfortunate decline in civility. In any event, the First Amendment does not permit such cavalier restrictions on one of our most basic freedoms.

This Court has constructed a four-prong test that any governmental entity must satisfy before it can restrict commercial speech. Originally set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) ("*Central Hudson*"), that test requires Petitioner to prove with admissible evidence that it has a substantial interest in restricting speech, that the harms it identifies are real and will be alleviated directly and materially by its restriction, and that the scope of its restriction is narrowly tailored to its asserted purpose. On these cross-motions for summary judgment, Petitioner failed to create a record that satisfies any of these requirements.

Apparently recognizing its failure of proof, Petitioner makes the radical suggestion that the Court overrule its uninterrupted line of decisions that have placed lawyer advertising squarely within the commercial speech doctrine. According to Petitioner, State bar regulators, not the First Amendment, should determine the extent of lawyers' speech rights because lawyers serve a "public function." Petitioner's reasoning is flawed for numerous rea-

sons. Most important, its acceptance by this Court would cut a gaping hole in the First Amendment through which all sorts of speech would fall to reduced levels of protection.

Finally, Petitioner, seeking another way around *Central Hudson*, argues that its Rule is in fact a reasonable time, place or manner restriction. However, Petitioner does not satisfy any of the three elements necessary to such a finding: content neutrality; direct advancement of a substantial interest; and reasonable alternative avenues of communicating with recent accident victims.

The commercial speech doctrine, as applied by this Court since 1976, must uniformly protect all commercial speech or be put at risk of being dismantled piece by piece. Petitioner has failed to justify its censorship of truthful, non-misleading commercial speech under this Court's established standards. The Eleventh Circuit's well-reasoned decision should be affirmed.

ARGUMENT

I. PETITIONER HAS NOT MET THE SUBSTANTIAL BURDEN OF PROOF IMPOSED ON WOULD-BE REGULATORS OF COMMERCIAL SPEECH

A. Commercial Speech, Including Lawyer Advertising, Is A Valued Part Of The National Discourse And Receives Vigorous Constitutional Protection

Eighteen years ago, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) ("*Virginia Pharmacy*"), this Court recognized that the First Amendment protects commercial speech. One year later, the Court held that constitutional protection of lawyer advertising "flow[s] *a fortiori*" from the principles announced in *Virginia Pharmacy*. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 365 (1977) ("*Bates*"). Petitioner's attack today on lawyer advertising must be understood as a threat to the constitutional principles that protect all commercial speech.[1]

Protection of commercial speech stems from recognition of its unique role in the development of consumer awareness in a free enterprise economy. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) ("*Edenfield*"); *Virginia Pharmacy*, 425 U.S. at 761-62. Contrary to Petitioner's repeated denigration of the constitutional value of advertising, "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates*, 433 U.S. at 364. Thus, the goal of the commercial speech doctrine is to expand the realm of expression in the belief that " 'people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them. . . .' " *Central Hudson*, 447 U.S. at 562 (citation omitted); *see Edenfield*, 113 S. Ct. at 1798.

---

[1] **The terms "lawyer advertising" and "lawyer solicitation" are used interchangeably in this Brief.**

These constitutional principles apply with no less force to advertising for legal services. As Justice Stevens observed in *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990) ("*Peel*"), the government's authority to restrict lawyers' commercial speech "is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Id.* at 108 (*citing Virginia Pharmacy*, 425 U.S. at 770). From a constitutional perspective, lawyer advertising is indistinguishable from other forms of commercial speech: "[p]rophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to [lawyer] advertising." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646-47 (1985) ("*Zauderer*").

The government may not censor a particular commercial message because some members of the population believe the message to be of slight worth. *Edenfield*, 113 S. Ct. at 1798. "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price." *Virginia Pharmacy*, 425 U.S. at 765. More to the point, the fact that some people might find lawyer advertising offensive or beneath the dignity of the bar cannot justify suppressing it. *Zauderer*, 471 U.S. at 648; *see Bates*, 433 U.S. at 368-72.

When government restricts commercial speech, the courts must conduct a searching review of governmental ends and means. Courts cannot unquestioningly accept "merely rational legislative judgments" that censor commercial speech because "democracy stands on a stronger footing when courts protect First Amendment interests." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519 (1981) ("*Metromedia*") (plurality opinion). Similarly, when lawyer advertising is restricted, the First Amendment forbids the courts from simply deferring to a State bar entity such as Petitioner. *Peel*, 496 U.S. at 108 (plurality opinion); *see Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion) (stressing that, in First Amendment cases, "deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law' " (citations omitted)).

This Court has crafted a four-prong test that the government must satisfy before it can restrict commercial speech. Petitioner conspicuously omits a full statement of this test from its Brief, perhaps because it failed to create a record based on admissible evidence that could possibly sustain its burden of proof. The test was originally set forth in *Central Hudson*, 447 U.S. at 564:

> (1) If the communication is neither misleading nor related to unlawful activity, . . .
>
> (2) the [government] must assert a substantial interest, [and]
>
> [t]he limitation on expression must be designed carefully to achieve the [government]'s goal. Compliance with this requirement may be measured by two criteria:
>
> (3) the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose[;]
>
> (4) if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

If the government cannot satisfy the second, third and fourth prongs of this test, a restriction on commercial speech cannot pass constitutional muster. *Id.* at 566; *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988) ("*Shapero*").

In the past two years, this Court has rigorously applied the *Central Hudson* test in two professional solicitation cases—cases that, inexplicably, never appear in Petitioner's Brief. *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084 (1994) (*"Ibanez"*); *Edenfield*, 113 S. Ct. 1792. In both *Ibanez* and *Edenfield*, the Court emphasized the high constitutional value of commercial speech, the heavy burden on the government to come forward with specific evidence to satisfy the *Central Hudson* test, and the independent role of the judiciary in reviewing that evidence. *Ibanez*, 114 S. Ct. at 2086, 2088-89; *Edenfield*, 113 S. Ct. at 1800.

Not surprisingly, government regulators have usually failed to satisfy the demanding *Central Hudson* test in their attempts to restrict the truthful, non-misleading commercial speech of lawyers. Indeed, government has prevailed in only one of the seven cases involving non-misleading lawyer solicitation that have been decided by this Court since recognition of the commercial speech doctrine.[2]

Confronted with this history of failed attempts to restrict non-misleading lawyer solicitation, Petitioner mischaracterizes the Court's decisions as being based not on the *Central Hudson* test but a *sub silentio* test that prohibits all restrictions on lawyer solicitation unless it is misleading or conducted in-person. Petitioner's Brief at 13. To the contrary, the Court consistently has applied the *Central Hudson* test to reject certain specific restrictions on lawyers' commercial speech because the burden of proof on would-be regulators is "not slight," *Ibanez*, 114 S. Ct. at 2089, and has not been met by Petitioner's predecessors in censorship. Similarly, Petitioner cannot satisfy the *Central Hudson* test with a "record so bare" as the one on which it relies here. *See id.* at 2091.

---

[2] *Compare Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (*"Ohralik"*) *with Bates*, 433 U.S. 350; *In re R.M.J.*, 455 U.S. 191 (1982); *Zauderer*, 471 U.S. 626; *Shapero*, 486 U.S. 466; *Peel*, 496 U.S. 91; and *Ibanez*, 114 S. Ct. 2084.

B. Petitioner Has Failed To Identify A Substantial Interest Or Develop An Evidentiary Record That Satisfies *Central Hudson*

1. *Petitioner Has Not Identified a Substantial Interest That Justifies Its Restriction*

a. *All Protected Speech Is Endangered by Petitioner's Asserted "Substantial Interest" in Protecting a Purportedly "Vulnerable" Audience from Commercial Messages*

In its attempt to satisfy the second prong of the *Central Hudson* test, Petitioner describes a supposed "substantial interest" that, if accepted, would threaten all constitutionally protected speech. According to Petitioner, it has a substantial interest in keeping a particular message from certain adults because Petitioner believes they cannot handle the message. More specifically, Petitioner asserts that recent accident victims are "most vulnerable," Petitioner's Brief at 27, and their "personal privacy and tranquility" will be unduly disturbed by attorney solicitation letters.[3] *Id.* at 25.

---

[3] This Court's analysis under the second prong is limited to the purported substantial interest asserted by Petitioner. "Unlike rational basis review, the *Central Hudson* standard does not permit [the Court] to supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 113 S. Ct. at 1798. Petitioner identifies only the protection of "personal privacy and tranquility" as its purported substantial interest under *Central Hudson*.

In an unrelated context, Petitioner asserts that the States have a "substantial interest in maintaining the professionalism of the bar and public confidence in the administration of justice." Petitioner's Brief at 7. This assertion was not made below, and, in any event, has been thoroughly rejected as a sufficient interest to satisfy the second prong. *Bates*, 433 U.S. at 368-72, 375-77.

Notably, not one of Petitioner's supporting *amici* argues that the Rule can be upheld on the basis of the purported substantial interest identified by Petitioner. Instead, those *amici* concoct various interests that, because they are not asserted by Petitioner,

Petitioner's "vulnerable audience" argument is antithetical to the commercial speech doctrine: "the general rule is that *the speaker and the audience, not the government,* assess the value of the information presented." *Edenfield,* 113 S. Ct. at 1798 (emphasis supplied). Moreover, even if the particular commercial message is offensive to some adults, that does not empower the government to deprive commercial speakers of their right to communicate with other adults through truthful, non-misleading speech. *Zauderer,* 471 U.S. at 648.

Petitioner's focus on the purported vulnerability of the recipients of the subject speech poses special dangers for the First Amendment. In our "victim" culture, people are increasingly prone to shift responsibility for their own conduct to others. People with eating disorders blame fashion advertisers, parents blame television programmers for their children's violent behavior, and "shopaholics" blame all advertisers. Under Petitioner's reasoning, the government can censor virtually any form of speech by claiming to act in the name of such purportedly vulnerable people. But just as the First Amendment puts faith in individual Americans, not government, to determine the value of protected speech, *Edenfield,* 113 S. Ct. at 1798, so too must American citizens assume responsibility for accepting, rejecting or simply disregarding that speech without a governmental filter. Similarly, government cannot be permitted to assert the hypothetical or even actual sensitivities of certain people as a backdoor justification for banning truthful, non-misleading speech. *See Texas v. Johnson,* 491 U.S. 397, 414 (1989).

---

are irrelevant under *Central Hudson*. *Edenfield,* 113 S. Ct. at 1798. A particularly insufficient interest is suggested in the Brief of the Association of Trial Lawyers of America ("ATLA")—a group consisting primarily of plaintiffs' personal injury lawyers. ATLA favors Petitioner's Rule because it believes that lawyer advertising results in lower jury awards, and, implicitly, lower compensation for ATLA's members. The First Amendment, however, does not allow speech to be restricted because certain lawyers would like to make more money.

In *Shapero,* the Court firmly rejected the argument that commercial speech can be restricted where the government believes certain consumers cannot handle the message. 486 U.S. 466. In overruling the lower court's decision that upheld a ban on targeted, direct-mail solicitation by lawyers, the Court held that:

> Of course, a particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity for good judgment" regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement—concededly constitutionally protected activities—or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose "*condition*" makes them susceptible to undue influence, but whether the *mode of communication* poses a serious danger that lawyers will exploit any such susceptibility.

Id. at 474 (emphasis supplied).

b. *Petitioner Does Not Have a Substantial Interest in Banning Targeted Solicitation Letters, Especially Given Their Value to Lawyers and Their Usefulness to Consumers*

The relevant inquiry here is not whether the "condition" of recent accident victims is such that they must be protected from targeted solicitation letters, but whether that mode of communication gives rise to a substantial governmental interest in protecting the "personal privacy and tranquility" of the injured victims or their families. *See id.* This precise issue was resolved in favor of protecting speech in *Shapero*:

> Nor does a targeted letter invade the recipient's privacy any more than does a substantially identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs,

> not when he confronts the recipient with the discovery.

Id. at 476.[4]

Indeed, the very nature of letters makes it highly unlikely that they will disturb the personal privacy and tranquility of recipients in a constitutionally cognizable manner under the second prong of *Central Hudson*. As held in *Shapero*, "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored or discarded."[5] *Id.* at 475-76. Similarly, as the Court stated in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1982) ("*Bolger*"), "the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Id.* at 72 (citation omitted) (invalidating restriction on direct mail advertising for contraceptives). Moreover, as Petitioner concedes in its Comment to the Rule, those Florida citizens who do not want to consider lawyer solicitations could simply discard the letters without reading them, as the Rule requires all such envelopes and letters to be stamped in red with the word "advertisement." *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So. 2d 451, 468 (Fla. 1990) ("*The Florida Bar: Petition to Amend*"); *see Shapero*, 486 U.S. at 477.

The insubstantiality of Petitioner's asserted interest in restricting this particular type of speech is underscored

[4] *Cf. id.* at 475 (describing *Ohralik*, 436 U.S. 447, as upholding a ban on in-person solicitation by lawyers because of the "potential for overreaching and undue influence" inherent in that "mode of communication"); *Edenfield*, 113 S. Ct. at 1802 (explaining "that *Ohralik*'s holding was narrow and depended upon certain 'unique features of in-person solicitation of lawyers' that were present in the circumstances of that case").

[5] The *Shapero* court's reasoning applies here regardless of the Rule's 30-day limitation, as that limitation does not alter the mode of communication, *i.e.*, targeted solicitation letters.

by its value both to lawyers and the intended recipients of their letters. Although the value of a particular truthful commercial message is irrelevant to its unalterable status as constitutionally protected speech, *see Edenfield*, 113 S. Ct. at 1798, it is relevant to whether the government has a substantial interest in suppressing that message, *see, e.g., Bates*, 433 U.S. at 369-70.

The speech banned by Petitioner is highly valuable to many members of the Florida bar who represent plaintiffs in personal injury and wrongful death actions. Petitioner lacks any legitimate interest in limiting the right of those lawyers to truthfully communicate with potential clients about their professional skills and experience. *See Bates*, 433 U.S. at 364. The fact that lawyers, like most working people, are motivated by the desire to earn a living does not reduce their entitlement to First Amendment protection. To the contrary, solicitation has considerable value in large part because of that motivation: "[a] seller has a strong financial incentive to educate the market and stimulate demand for his product or service, so solicitation produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact." *Edenfield*, 113 S. Ct. at 1797.

Moreover, the Rule has a discriminatory economic and speech impact on a certain class of lawyers for whom the banned speech is particularly valuable. As Justice Marshall stated in *Ohralik*, restrictions on attorney solicitation "fall most heavily on those attorneys engaged in a single-practitioner or small-partnership form of practice—attorneys who typically earn less than their fellow practitioners in larger, corporate-oriented firms." 436 U.S. at 475 (concurring opinion; citations omitted). These attorneys lack the reputation or connections that allow more established practitioners to attract business without advertising. The uneven economic impact of the Rule goes a long way toward explaining why various associations of

trial lawyers and bar associations have weighed in as *amici* on the side of Petitioner. Members of the legal establishment benefit economically from restrictions like Petitioner's Rule that limit the access of less-established lawyers to potential clients.

In addition to the right of lawyers to communicate the banned messages, recent accident victims may have a particularly pressing need for the censored information. As held in *Zauderer*, lawyer advertising that "tend[s] to acquaint persons with their legal rights who might otherwise be shut off from effective access . . . [is] . . . undoubtedly more valuable than many other forms of advertising." 471 U.S. at 646. Similarly, the Federal Trade Commission, in a report cited in *Peel* to emphasize the value of lawyer advertising, concluded that a "principal reason why consumers do not consult lawyers is because they do not know how to find a lawyer able to assist them with their particular problems." 496 U.S. at 110 n.18 (plurality opinion); *see Bates*, 433 U.S. at 370.

The value to potential clients of the lawyer advertising banned here was noted by Justice Shaw of the Florida Supreme Court, who wisely dissented from that Court's adoption of the Rule, in a passage quoted favorably by the Eleventh Circuit:

> This ban will effectively deprive many accident victims of information concerning the availability of professional legal assistance precisely when they need it most—during the initial period following a serious accident when they are confronted with an unintelligible legal tangle and demands to waive or compromise their rights. It is during this time that informed decisionmaking is crucial.

McHenry v. The Florida Bar, 21 F.3d 1038, 1043 n.12 (11th Cir.) ("*McHenry*") (citation omitted), *cert. granted*, 115 S. Ct. 42 (1994). Although all truthful, non-misleading commercial speech is constitutionally protected regardless of whether the government or the courts

believe it has any informational value, the Eleventh Circuit properly considered the high value of the speech banned by the Rule in finding that Petitioner had not satisfied the second prong of *Central Hudson*.

This Court cannot simply accept that Petitioner's asserted interest is substantial. Rather, " 'the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights [so vital to the maintenance of democratic institutions].' " *Metromedia*, 453 U.S. at 520 (citation omitted). The Eleventh Circuit correctly held that Petitioner has not identified a substantial interest in censoring truthful, non-misleading lawyer solicitation. Moreover, any interest that Petitioner might have is clearly rendered insubstantial by the usefulness to recent accident victims of information about legal representation and the right of lawyers to communicate with those individuals. Petitioner's failure to meet its burden under the second prong alone requires affirmance of the Eleventh Circuit's decision.

2. *Petitioner Also Failed to Submit Any Evidence to Demonstrate That Its Rule Directly and Materially Advances Its Asserted Purpose of Protecting Personal Privacy and Tranquility*

Neither can this Court find that Petitioner has met its burden of proof under the third prong without completely draining that prong of its power as a protector of speech. In *Edenfield*, the Court described the government's burden:

> This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech *must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.*

113 S. Ct. at 1800 (emphasis supplied). On these cross-motions for summary judgment, Petitioner absolutely failed to create a record that demonstrates (i) that the harms of disturbing the privacy and tranquility of recent accident victims are real rather than merely hypothetical or (ii) that a 30-day ban on lawyer solicitation letters will in fact directly and materially reduce any such harms.

The *Ibanez* decision illuminates Petitioner's failure to demonstrate that the asserted harms are real. There, the Florida Board of Accountancy ("Board") declared Ibanez guilty of, *inter alia,* using the designation "Certified Financial Planner" in a misleading manner. 114 S. Ct. at 2089. The Court found that the Board had not satisfied the third prong: "[g]iven 'the complete absence of any evidence of deception,' . . . the Board's 'concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.' " *Id.* at 2090 (citations omitted); *see Edenfield,* 113 S. Ct. at 1803.

Similarly, Petitioner has not introduced any evidence that recent accident victims or their families believe that their privacy or tranquility is being disturbed by anything other than the unfortunate accident itself. The only "evidence" of any sort submitted by Petitioner on its cross-motion for summary judgment is its survey of Florida adults, and that survey speaks not at all to whether the purported harms are real. Moreover, the survey is not the type of evidence that could satisfy Petitioner's burden under the third prong, as it is no more than a collection of opinions about lawyer advertising, whereas *Central Hudson* requires the government to prove a causal connection between the restriction on speech and the alleviation of a real harm. *See Edenfield,* 113 S. Ct. at 1800.

Further, Petitioner has not demonstrated, as it must, that its Rule will protect the personal privacy and tranquility of recent accident victims in a direct and material way. *See id.* Like the Florida Board of Accountancy in

Edenfield, Petitioner "presents no studies" or "any anecdotal evidence, either from Florida or another State, that validates [Petitioner's] suppositions." *Id.* Indeed, Petitioner's other restrictions—unchallenged here—make it particularly unlikely that lawyer solicitation letters cause the asserted harm. Such letters (i) must not subject the recipient to coercion, duress, fraud, overreaching, harassment, intimidation or undue influence, (ii) must be marked in red with the word "advertisement" on the envelope and every page of the letter, (iii) must be sent by the United States mail only, (iv) must look like a letter, not a pleading or other legal document, and (v) must not reveal the nature of the recipient's legal problem on the outside of the envelope. *See McHenry,* 21 F.3d at 1040-41 n.6.

Moreover, the very reality of Petitioner's asserted purpose, let alone its material advancement, is belied by the fact that the Rule does not ban far more upsetting letters or communications from representatives of the potentially liable parties involved in the accident that pressure the recipients to waive or compromise their legal rights. Indeed, those representatives are free to contact recent accident victims in person, a mode of communication that this Court recognized in *Ohralik* has great coercive potential.[6] *See Shapero,* 486 U.S. at 475. *See generally Central Hudson,* 447 U.S. at 564 ("the regulation may not be sustained if it provides only ineffective or remote support

[6] The Rule also leaves intact an intrusion on recent automobile accident victims that is mandated by the State of Florida. Section 316.066 of Florida's traffic law requires the driver of any vehicle involved in an accident resulting in personal injury or death to submit a written accident report within five days unless the investigating officer does so. Fla. Stat. Ann. § 316.066 (West 1994). This requirement—which is much more disturbing than discarding an unopened envelope marked "advertisement"—casts substantial doubt on whether Petitioner's Rule could materially protect the tranquility of recent accident victims.

for the government's purpose"); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993) (regulation that had only "minute" or "paltry" effect did not materially advance statute's purpose).

Petitioner omits from its Brief any discussion of the third prong of *Central Hudson*. That omission is additionally fatal to Petitioner's case. The First Amendment places the burden of proof on all would-be regulators of speech, and that burden cannot be satisfied by silence. *See Zauderer*, 471 U.S. at 646.

3. *Petitioner Also Has Not Demonstrated That Its Rule Is Narrowly Tailored to Achieve Its Asserted Purpose*

In addition, Petitioner completely ignores its constitutional burden under the fourth prong of *Central Hudson*. That prong requires the government to demonstrate that its restriction is "no more extensive than necessary to serve" the asserted interest. *Ibanez*, 114 S. Ct. at 2088 (citation omitted). If a restriction on speech is overinclusive—if it bans speech having nothing to do with its purported purpose—then the restriction is impermissible under the fourth prong. *Central Hudson*, 447 U.S. at 570-71.

Petitioner's Rule is overinclusive because it covers speech directed toward recent accident victims who are unlikely to be particularly upset by lawyer solicitation letters. As the Eleventh Circuit noted, some of the potential clients will have suffered "relatively minor injuries" from a "simple slip and fall." *McHenry*, 21 F.3d at 1043 n.9. The Rule also prohibits communications with a potential client merely involved in a fender-bender with a resulting sore neck. Moreover, even among victims of serious accidents, many are more likely to welcome information about available legal services than to be disturbed by lawyer solicitation letters. Surely, if the fourth prong means anything, Petitioner's overinclusive ban cannot be deemed "in proportion to the interest served." *In re R.M.J.*, 455 U.S. at 203.

The primary decision on which Petitioner relies highlights the overinclusiveness of the Rule. *In re Anis*, 599 A.2d 1265 (N.J. 1991) ("*Anis*"), *cert. denied sub nom.*, 112 S. Ct. 2303 (1992). It must first be noted that Petitioner's description of *Anis* is grossly inaccurate. *Anis* did not involve "a restriction similar to Florida's." *See* Petitioner's Brief at 27. Rather, the restriction upheld in *Anis* is virtually identical to a regulation in Florida that is *not* being challenged here. Both jurisdictions prohibit written comunication with a potential client by a lawyer who knows or reasonably should know that the person's physical, emotional or mental state is such that the potential client could not exercise reasonable judgment in employing a lawyer. *Compare* 599 A.2d at 1268 *with* R. 4-7.4(b)(1)(F). Whereas the latter regulation was found to be narrowly tailored to restrict speech in only limited instances, Petitioner's Rule applies to all manner of communications without regard to the emotional state of the potential client.

By a remarkable coincidence, the *Anis* court, in a passage omitted by Petitioner, directly commented on the overinclusiveness of a restriction like Petitioner's:

> Would a truthful solicitation letter sent *fifteen or thirty days* after a tragic loss reach people when they are no longer emotionally weak or vulnerable? We cannot say with certainty, since our *assumptions* in such cases are largely untested. It may be that there are degrees of loss or suffering. Common sense tells us that the *mildly-injured survivors* of an overturned-bus incident might be less vulnerable than were the Lockerbie families. Hence, we attempt no permanent brightline rule in this opinion.

Anis, 599 A.2d at 1271 (emphasis supplied). In contrast to the rule reviewed by the *Anis* court, Petitioner's

Rule is a permanent brightline restriction on speech based on completely untested and unproven assumptions.

As this Court held in *Edenfield* concerning restrictions on commercial speech, " '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " 113 S. Ct. at 1803-04 (citation omitted). Petitioner has failed to carefully calculate the costs of its overinclusive Rule, and cannot be held to have satisfied the fourth prong.

In sum, Petitioner has not met its burden under the second, third or fourth prong of *Central Hudson*. Consequently, the Rule must be stricken as unconstitutional under the First Amendment.

II. LAWYER ADVERTISING IS INSEPARABLE FROM COMMERCIAL SPEECH GENERALLY AND MAY NOT RECEIVE REDUCED CONSTITUTIONAL PROTECTION

Unable to journey back in time to create a record or fashion an argument sufficient to justify its restriction on speech under *Central Hudson*, Petitioner instead asks this Court to turn back the clock on the commercial speech doctrine. That request must be rejected.

This Court's lawyer advertising cases have been at the heart of the commercial speech doctrine as it has developed during the past 18 years. Based on the principles flowing from those cases, commercial speech has matured into a strong, highly-protected component of the national discourse. Petitioner's demand that lawyer advertising be surgically excised from the body of commercial speech threatens that entire body.

Restrictions on lawyer advertising account for far more of this Court's commercial speech decisions than any other subject. The higher incidence of unconstitutional restrictions on lawyer advertising no doubt stems from the simple fact that, until the *Bates* decision in 1977, 433

U.S. 350, most States could and did completely ban lawyers' commercial speech. Unlike advertising for other products and services, lawyer advertising apparently has too short a history to be free of controversy, and remains unpopular with many adults.[7]

In our constitutional system, the unpopularity of speech calls not for censorship but for vigilant protection. As this Court held in *Texas v. Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[8] 491 U.S. at 414 (*citing Bolger*, 463 U.S. at 65, 72; other citations omitted). In disregard of this principle, Petitioner argues that the First Amendment must be sacrificed to popular sentiment against lawyers and their advertising. Petitioner's Brief at 14-15.

Petitioner attempts to cloak its argument in States' rights, *id.* at 7, but clearly no State has the right to violate the Federal Constitution. As explained in *Peel*, deference

---

[7] While Petitioner bemoans the *Bates* decision as "thrust[ing] aside centuries of Anglo-American law defining the role of the lawyer in our system of justice," Petitioner's Brief at 9, the traditonal ban on lawyer advertising stemmed not from ethics, but the elitist etiquette of early lawyers who "looked down on 'trade' as unseemly." *Bates*, 433 U.S. at 371 (citation omitted).

[8] The strength of this "bedrock principle" against censorship is illustrated powerfully by *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (*"R.A.V."*). There, the Court considered a content-based ban on "fighting words," one of the few categories of speech that may be entirely proscribed on the basis of content. *Id.* at 2542-43 (plurality opinion). Nonetheless, the Court invalidated the challenged ban by applying a "strict scrutiny" test. *Id.* at 2549-50 (plurality opinion). Although *amici* feel constrained by precedent to analyze Petitioner's Rule under *Central Hudson*, they respectfully invite the Court to consider, in light of *R.A.V.*, whether content-based restrictions on commercial speech—a category of speech higher in the hierarchy of constitutional protection than "fighting words," *id.* at 2564 (concurring opinion)—should also be protected by a "strict scrutiny" test.

to the States in the area of lawyer advertising is inappropriate as it "would create radical disparities in First Amendment protections from State to State." 496 U.S. at 108 n.16 (plurality opinion). Unlike State regulation of health care or welfare reform, there is simply no room for the "experimentation and innovation" advocated by Petitioner where constitutional rights are at stake. *See* Petitioner's Brief at 24.

In support of its "States' rights" argument, Petitioner essentially claims that the States have an extra-special interest in lawyer advertising because it is part of a "public function," and that interest takes lawyer advertising out of the First Amendment. Petitioner's Brief at 17-23. But Petitioner's two explanations for its asserted "public function" rationale cannot withstand scrutiny. First, Petitioner contends that constitutional protection should be substantially reduced because "the public might reasonably perceive attorney advertising to bear the imprimatur of the entire judicial system." Petitioner's Brief at 22. The absence of any evidence to support this extraordinary conjecture (which probably "rests on an underestimation of the public," *Bates*, 433 U.S. at 375) deprives it of any probative value. *See Ibanez*, 114 S. Ct. at 2089-91 (rejecting unsupported contention that the public will be misled by the word "certified" into believing that State approval exists).

Second, Petitioner resurrects the hoary "right-privilege" distinction to argue that lawyers give up their constitutional right to commercial speech when they are "granted the privilege" of serving the judicial system. Petitioner's Brief at 22-23. But even 31 years ago, it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a right or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see Perry v. Sindermann*, 408 U.S. 593, 599 (1972). Certainly, when lawyers are outside the courtroom, and soliciting business like other

purveyors of lawful services, they cannot be deemed to have waived their First Amendment rights. *See The Florida Bar: Petition to Amend*, 571 So. 2d at 475 ("a lawyer cannot be forced to surrender all first amendment freedom as the price of practicing law" (Barket, J., concurring in part, dissenting in part)).

Further, Petitioner's "public function" analogy reaches much too far. If lawyers' commercial speech receives less constitutional protection because "the public's perception of, and confidence in, its system of justice and those who administer it is critical to the stability of a democratic society," Petitioner's Brief at 19, then lawyers' *noncommercial* speech specifically criticizing the justice system (e.g., a local bar association's rating of sitting judges) would be regulable.[9] In addition, the "public function" analogy could easily be extended to reduce commercial speech protection for all licensed professions. *See Ohralik*, 436 U.S. at 460 (holding that "the State bears a special responsibility for maintaining standards among members of the licensed professions," including opticians and dentists).

This Court has consistently protected lawyer advertising because of the same First Amendment principle that protects all commercial speech—the principle that " 'information is not in itself harmful, [and] that people will perceive their own best interests if only they are well enough informed. . . .' " *Bates*, 433 U.S. at 365 (*quoting Virginia Pharmacy*, 425 U.S. at 770); *see* this Brief at

---

[9] Indeed, Petitioner's melodramatic contention that lawyers are subject to greater regulation because they have been "entrusted with the performance of a critical constitutional function," Petitioner's Brief at 22, ignores reality. Most of the work performed by lawyers, and much of lawyer advertising, concerns tasks such as real estate closings and the drafting of wills, which do not directly implicate constitutional rights. Indeed, the only thing "constitutional" about personal injury litigation would appear to be its placement within the judicial system created by a State's constitution.

5-8. Indeed, the general body of commercial speech law owes much of its doctrinal basis to lawyer speech decisions. The Court has routinely cited those decisions in cases involving commercial speech other than lawyer advertising.[10] To overrule, or distinguish out of existence, the 17 years of lawyer advertising cases thus would threaten the viability of the entire commercial speech doctrine. Petitioner's unprincipled argument must be rejected.

III. PETITIONER'S RULE MEETS NONE OF THE ELEMENTS OF A REASONABLE TIME, PLACE OR MANNER RESTRICTION ON SPEECH

Petitioner's Rule does not satisfy any of the three requirements for a reasonable time, place or manner restriction on speech. The Rule does not restrict lawyer advertising (1) without regard to the content of the communication, (2) in a manner narrowly tailored to serve a significant governmental interest, (3) leaving open alternative channels for communication. *See Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293-94 (1984).

The Eleventh Circuit succinctly stated why the Rule fails the first element of the test:

> On its face the thirty-day Rule is unambiguously content-based. It applies only to letters that "concern[] an action for personal injury or wrongful death." R. 4-7.4(b)(1)(A). It is, then, the subject matter of the letter, a solicitation for a certain type of representation, that triggers application of the Rule.

McHenry, 21 F.3d at 1044; *see Metromedia,* 453 U.S. at 515 (plurality opinion).

---

[10] *See, e.g., United States v. Edge Broadcasting Co.,* 113 S. Ct. 2696, 2703, 2704-05 (1993); *Edenfield,* 113 S. Ct. at 1800; *City of Cincinnati v. Discovery Network, Inc.,* 113 S. Ct. at 1513; *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 479 (1989); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.,* 478 U.S. 328, 340-41 (1986); *Bolger,* 463 U.S. at 64-65; *Metromedia,* 453 U.S. at 506 (plurality opinion); *Central Hudson,* 447 U.S. at 562-66; *Friedman v. Rogers,* 440 U.S. 1, 8-10 (1979).

In fact, by its terms the Rule applies to even more content than the Eleventh Circuit recognized because it is directed at letters that are written for the "purpose of obtaining professional employment." R. 4-7.4(b)(1). This qualification undermines Petitioner's suggestion that it could enforce the Rule without reference to content by considering only the source of the list of recipients. Petitioner's Brief at 29-30 n.10. For example, an attorney who represents the potentially liable party involved in a disaster likely would rely on that same source to identify recipients of letters seeking releases or waivers, but those letters—which do not seek professional employment—are not banned by the Rule.[11]

Ward v. Rock Against Racism, 491 U.S. 781 (1989) affords Petitioner no help. Petitioner's Brief at 30-32. In *Ward,* the restriction on speech, a sound-amplification guideline, was justified without reference to the content of amplified music. *Id.* at 791. For *Ward* to be analogous here, its ban would need to have been on amplified music with lyrics on a specific topic—a ban that no doubt would have been impermissible under the First Amendment.

Petitioner also mistakenly relies on *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986). There, a zoning ordinance that restricted the location of adult movie theatres was upheld because it was "aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theatres on the surrounding community [*e.g.*, crime and depressed real estate values]." *Id.* at 47-48. In contrast, Petitioner has banned certain lawyer solicitation letters because it believes the *content* of those letters—not simply the delivery of the envelopes—will disturb the personal privacy and tranquility of the recipients. *See* Petitioner's Brief at 8.

---

[11] Moreover, serious due process issues are raised by Petitioner's suggestion that it would sanction lawyers for violating the Rule without actually considering the content of the supposedly offending letters, but only the source of the list of recipients.

The second element necessary to a reasonable time, place or manner restriction is similar to the second and third prongs of the *Central Hudson* test. The restriction "must serve a substantial state interest in 'a direct and effective way.'" *Edenfield*, 113 S. Ct. at 1801 (citation omitted). Petitioner has not satisfied these requirements of the second element, which it ignores in its Brief, for the same reasons that it has not met its comparable burden under *Central Hudson*. *See* this Brief at 9-15.

As to the third element, Petitioner has not demonstrated that its Rule leaves open alternative channels for lawyers to communicate with recent accident victims. If, as Petitioner claims, all such potential clients are consumed by their grief, they are unlikely to be reading advertisements in newspapers or yellow pages, or listening to commercials on radio or television. The only way to communicate effectively with recent accident victims (other than banned in-person solicitation) is through the "more efficient" medium of targeted direct mail. *Shapero*, 486 U.S. at 473. There is simply no reasonable alternative for plaintiffs' lawyers, *see Metromedia*, 453 U.S. at 516 (plurality opinion), particularly since the Rule leaves the "other side" to potential litigation involving the recipient with unrestricted and immediate written, and even in-person, access.

Petitioner closes this section with a familiar refrain—that if it has not satisfied the "reasonable time, place or manner" test, then "it is difficult to conceive of a type of attorney solicitation regulation that would qualify." Petitioner's Brief at 33. Petitioner apparently has forgotten the decision in *Ohralik*, which upheld a prophylactic ban on in-person solicitation by lawyers. 436 U.S. 447. More importantly, the "time, place or manner" test, like the *Central Hudson* test, is not supposed to be easily met given the basic freedoms at stake. Petitioner cannot blame the First Amendment for its own failure of proof.

CONCLUSION

Rule 4-7.4(b) is a content-based regulation of truthful, non-misleading commercial speech. It is impermissible because Petitioner has not met its burden of proof under the standards established in *Central Hudson*. Further, Petitioner has not identified a single principled basis for this Court to overrule its 17 years of decisions that uniformly have placed lawyer advertising squarely within the protection of the First Amendment applied to all forms of commercial advertising.

Respectfully submitted,

Of Counsel:
P. CAMERON DEVORE
GREGORY J. KOPTA
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150

ANDREW AUERBACH
THE MEDIA INSTITUTE
1000 Potomac Street, N.W.
Suite 301
Washington, DC 20007
(202) 298-7512

DAVID M. HUNSAKER
THE FREEDOM OF EXPRESSION FOUNDATION
5220 South Marina Pacifica Drive
Long Beach, CA 90803
(810) 985-3444

ROBERT M. O'NEIL
THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION
400 Peter Jefferson Place
Charlottesville, VA 22901
(804) 295-4784

JOHN J. WALSH *
STEVEN G. BRODY
MARY ELIZABETH TAYLOR
CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, NY 10038
(212) 504-6000
Counsel for Amici Curiae

* Counsel of Record

Supreme Court, U.S.
FILED
DEC 5 1994
OFFICE OF THE CLERK

No. 94-226

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,
Petitioner,

v.

G. STEWART McHENRY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

David C. Vladeck
(Counsel of Record)
Alan T.L. Sun

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen, Inc.

December 5, 1994

15 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS* 2

ARGUMENT 3

THE 30-DAY DIRECT MAIL BAN IS UNCONSTITUTIONAL. 3

I. THE PRIVACY INTERESTS CITED BY THE STATE DO NOT JUSTIFY THE BAN. 3

II. THE UNDERINCLUSIVE NATURE OF THE BAN CASTS DOUBT ON THE STRENGTH OF FLORIDA'S ASSERTED INTERESTS. 7

CONCLUSION 11

TABLE OF AUTHORITIES

Cases **Page**

In re Anis, 599 A.2d 1265, 126 N.J. 448 (N.J. 1992) . . 6

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) . . . 2

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 4, 5

City of LaDue v. Gilleo, 114 S. Ct. 2038 (1994) . . . 8, 9

Cohen v. California, 403 U.S. 15 (1971) 4

Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530 (1980) 4

Edenfield v. Fane, 113 S. Ct. 1792 (1993) 2, 8

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 9

Frisby v. Schultz, 487 U.S. 474 (1988) 6

Kovacs v. Cooper, 336 U.S. 77 (1949) 6

Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968) 4, 5

McHenry v. The Florida Bar, 21 F.3d 1038 (11th Cir. 1994) 5, 8

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) . . 9

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 2

Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) 2

In re Primus, 436 U.S. 412 (1978) 2

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) 3, 4, 6

The Florida Star v. B.J.F., 491 U.S. 524 (1989) 8

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 2

Rules & Regulations

16 C.F.R. § 429.1 (1992) 9

Rule 4.7-4(b)(6) of the Rules Governing the Florida Bar 5

Miscellaneous

Detroit Free Press, "Air Disasters Put Insurers Against Lawyers," Section NWS at 12B (August 18, 1987) 7

Detroit Free Press, "Putting a Price Tag on Life—Insurers Talk With Crash Family Victims," Section NWS at 1A (March 7, 1987) 7

In The

Supreme Court of the United States

October Term, 1994

No. 94-226

THE FLORIDA BAR,
Petitioner,

v.

G. STEWART McHENRY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

Amicus curiae Public Citizen, Inc. files this brief with the consent of the parties because of the important First Amendment concerns at stake in this case. In our view, Florida's 30-day ban on lawyers using direct mail to communicate with accident victims and their families unquestionably violates the First Amendment. Truthful, non-deceptive information which might inform accident victims and their families about the availability of counsel may not be suppressed absent the most compelling of reasons. Although the interests cited by The Florida Bar—protecting the privacy rights of accident victims and their families and shielding injured persons from being induced into making an ill-considered choice of lawyers—are perhaps valid in the

abstract, the 30-day mailing prohibition is not even a remotely reasonable way to achieve those ends. Accordingly, this Court should affirm the ruling below.

INTEREST OF *AMICUS*

Amicus Public Citizen is a national public interest organization with over 100,000 members. For 23 years, Public Citizen has worked to obtain and disseminate information relating to the availability and price of legal services so that consumers could make informed decisions when they are considering retaining an attorney. Public Citizen's lawyers handled two of this Court's recent cases concerning commercial speech by professionals, *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and they filed *amicus* briefs in a number of other commercial speech cases involving lawyer advertising, including *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990), *In re Primus*, 436 U.S. 412 (1978), *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1971).

Public Citizen files this brief because it is concerned that the interests of those who have the most at stake in this proceeding—recent accident victims and their families—may not stand out in the parties' treatment of the legal issues before the Court. We do not seek to duplicate or repeat the arguments that will be put forth by respondent. Rather, we highlight two points that may not be given prominence in respondent's more comprehensive treatment of the issues.

First, The Florida Bar seriously overstates the privacy interests at stake. This Court has consistently held that the minimal intrusion that results from direct mail is far too trivial to justify a restraint on First Amendment liberties.

Second, the ban is grossly underinclusive, since it does not apply to the hordes of insurance adjusters and defense

lawyers who besiege recent accident victims and their relatives to obtain waivers or quick and inexpensive settlements. If The Florida Bar and its *amici* were genuinely interested in shielding injured accident victims and grieving families from insensitive intrusions by lawyers, the ban would a universal one, not a limited one aimed solely at the only segment of the Bar interested in protecting the rights of the victim.

ARGUMENT

THE 30-DAY DIRECT MAIL BAN IS UNCONSTITUTIONAL.

Underlying Florida's 30-day mailing ban is the theory that the State has a "substantial interest in protecting the personal privacy and tranquility of persons who were themselves, or whose loved ones were, recent victims of personal injury or death." Pet. Br. at 25. Public Citizen has no quarrel with this general sentiment. But, as we now show, the means the Bar has selected—the 30-day ban on mailings—has nothing to do with its asserted goal, and therefore the decision below should be affirmed.

I. THE PRIVACY INTERESTS CITED BY THE STATE DO NOT JUSTIFY THE BAN.

The most glaring flaw in The Florida Bar's presentation is the assumption, which underlies the rationale for the ban, that the mere receipt by an injured accident victim or a grieving relative of a letter, clearly marked in red ink as a lawyer advertisement, constitutes an egregious invasion of privacy. In a series of decisions, including *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988), this Court has held that "the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations"

because the burden of having to deal with mail solicitations is too insignificant to justify a prohibition on speech. Thus, in *Shapero*, the Court struck down a categorical ban on targeted mailings by lawyers. Finding the asserted state goal of protecting against overreaching by lawyers insubstantial, the Court observed that mailings pose little threat to consumers because "[a] letter ... can readily be put in a drawer to be considered later, ignored or discarded." *Id.* at 475-76.

Shapero followed *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), where this Court struck down a ban on mail advertisements for contraceptives. In *Bolger*, the Postal Service defended the ban by citing the need to prevent material that the recipient might find offensive from entering the home on an unsolicited basis. The Court found that this interest "carries little weight," *id.* at 71, reasoning that "[r]ecipients of objectionable mailings ... may '"effectively avoid further bombardment of their sensibilities by simply adverting their eyes."'" *Id.* at 72 (*quoting Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542 (1980), *quoting Cohen v. California*, 403 U.S. 15, 21 (1971)). And in *Consolidated Edison*, the Court overturned a New York State Public Service Commission order forbidding utilities from including "bill inserts" addressing issues of public importance. In so ruling, the Court stressed that the state's principal justification—the prevention of utility companies from forcing their views on a captive audience—was far too tenuous because customers "may escape exposure to objectionable material simply by transferring the bill insert from the envelope to the waste-basket." 447 U.S. at 542 (footnote omitted).[1]

---

[1] *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, (continued...)

Florida seeks to evade the force of these rulings by arguing that recent accident victims and their families are especially emotionally vulnerable and therefore warrant greater protection than ordinary members of the public. The principal flaw in this argument is that, even assuming that The Florida Bar has correctly gauged the emotional state of the recipients (a point open question, since the ban applies to every accident victim, no matter how slight the injury, *McHenry v. The Florida Bar*, 21 F.3d 1038, 1043 n.9 (11th Cir. 1994)), another provision of the Florida Rules effectively addresses the problem. Under Rule 4.7-4(b)(6), the envelope and every page of all lawyer solicitation letters must bear a statement, in red ink, advising the recipient that the letter is a "advertisement." Once forewarned, the only recipients who will be exposed to the contents of the solicitation letters are those who take the affirmative step of opening the envelope and reading the contents. No one is compelled to do so; indeed, as the Court has noted in a host of cases, those who do not want to be troubled by such

---

[1](...continued)
391 U.S. 915 (1968), cited with approval in both *Bolger* and *Consolidated Edison*, uses perhaps the most colorful language in rejecting a privacy claim regarding mailings:

> The mail box, however noxious its advertising contents often seem to judges as to other people, is hardly the kind of enclave that requires constitutional defense to protect "the privacies of life." The short, though regular, journey from mail box to trash can . . . is an acceptable burden.

269 F. Supp. at 883.

advertisements can readily discard them unopened. *See, e.g.*, *Shapero*, 486 U.S. at 475.

Apparently recognizing the lack of support for its theory, The Florida Bar falls back to argue that, given the emotional vulnerability of the recipients, the mail solicitation at issue here is as invasive as the sound truck at issue at *Kovacs v. Cooper*, 336 U.S. 77 (1949), or the residential picketing addressed in *Frisby v. Schultz*, 487 U.S. 474 (1988). This argument is meritless. The core feature in both *Kovacs* and *Frisby* was the inability of the residents to disregard the communication—the blare of the sound truck or the din of the protesters could not be avoided. Here, by contrast, all the recipient must do to avoid the communication is to send the clearly marked, unopened letter on "the short journey from mail box to trash can." That burden is trivial by any measure, and surely cannot justify the serious abridgement of First Amendment rights at issue here.[2]

[2] *In re Anis*, 599 A.2d 1265, 126 N.J. 448 (N.J. 1992), on which petitioner relies (*see* Pet. Br. at 27-28), is not to the contrary. There are two crucial distinctions between *Anis* and this case. First, the concern of the *Anis* court about the intrusive nature of solicitation letters is fully dispelled by Florida's rule requiring such letters to be clearly marked. Apparently no such requirement existed in New Jersey. Second, unlike this case, which involves truthful and non-misleading communications, the offending letter in *Anis* contained serious misstatements of fact. 599 A.2d at 1271-72. Accordingly, *Anis* does not support petitioner here.

II. THE UNDERINCLUSIVE NATURE OF THE BAN CASTS DOUBT ON THE STRENGTH OF FLORIDA'S ASSERTED INTERESTS.

According to The Florida Bar, the mailing ban was enacted to protect citizens during a time of deep personal trauma from "crass commercial intrusion" upon their private grief. This goal—commendable in the abstract—is simply not advanced by the mailing ban. The fact is that the ban operates against only lawyers seeking to represent the accident victims or their families. It does not forbid contact by insurance adjusters and defense lawyers, who remain free to make in-person visits and telephone calls, and to send letters to recent accident victims or their families in an effort to settle the victim's claims. Thus, the ban does little to insulate accident victims and their families from unwelcome intrusions. Instead, the ban deprives victims of information concerning the availability of legal counsel at the time they need it most—when they are encircled by representatives of potential defendants urging the victims to compromise or waive their claims.[3]

Nor is the ban based on an accurate or even informed assessment of the needs of accident victims and their families. The Bar paternalistically speculates that what these victims need is peace and tranquility. But the Bar can cite no evidence to support its theory that accident victims want

[3] For instance, immediately following the crash of a Pan Am jetliner near New Orleans, representatives of the airline's insurance carrier began visiting and sending letters to the victim's families in an effort to settle claims. "Air Disasters Pit Insurers Against Lawyers," *Detroit Free Press*, Section NWS at 12B (August 18, 1987). Similar measures were taken by insurance carriers after other airline disasters. *E.g.*, "Putting a Price Tag on Life—Insurers Talk With Crash Victims Families," *Detroit Free Press*, Section NWS at 1A (March 7, 1987).

or benefit from this state-imposed 30-day insulation from lawyer solicitation letters.[4] *But see Edenfield v. Fane*, 113 S. Ct. at 1800 (requiring government, as a condition of regulating commercial speech, to show that the "the harms it recites are real" and that the restriction "will in fact alleviate ... [the problem] to a material degree").

Nor, as a practical matter, do the families of most accident victims have the opportunity simply to grieve in peace. The family of a seriously injured accident victim confronts difficult questions about treatment and rehabilitation. In a wrongful death case, the family is faced with burial and other expenses, as well as estate and probate issues. Inevitably, the family also encounters legal questions relating to whether some other party, who may bear responsibility for the accident, will be a source of compensation. Families should not be deprived of information regarding the availability of legal counsel when confronting these decisions—many, if not all, of which have legal aspects to them.

This Court has repeatedly held that underinclusive regulation in the First Amendment area "may diminish the credibility of the government's rationale for restricting speech in the first place." *City of LaDue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994). *Accord The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (underinclusiveness of statute raises serious doubts about whether state is serving the interests that it claims are furthered by the statute); *see also*

---

[4] The material cited by certain of petitioner's *amici* does not address this specific question. Nor, for that matter, does it focus on the core question here, namely, whether accident victims and their families would choose a ban on lawyer mailings during the period "when they are confronted with an unintelligible legal tangle and demands to waive or compromise their rights." *See McHenry v. The Florida Bar*, 21 F.3d at 1043 n.12 (citation omitted).

id. at 541-42 (Scalia, J., concurring); *FCC v. League of Women Voters of California*, 468 U.S. 364, 396-97 (1984); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 516 (1981). The reasoning of *City of LaDue* applies with full force here, given the irrationality of the coverage of the Florida ban.

Indeed, the highly selective nature of the coverage of the ban raises serious questions as to whether Florida's asserted interests are genuine. After all, the Florida ban leaves accident victims at the mercy of insurance adjusters and defense lawyers, who may ring the doorbells of the victims, telephone, or send mail, without any restraint by the state, not even a warning on the exterior of the envelope. It is incomprehensible that Florida believes that, on the one hand, the receipt of a clearly marked solicitation letter from a lawyer is a gross invasion of privacy, while, on the other hand, a barrage of visits, telephone calls and letters from potential defendants and their representatives is not. Making matters worse, the only way that an accident victim can effectively be insulated from the flood of defense entreaties is to retain an attorney. Yet the Florida rule is designed to complicate, not simplify, that process, by cutting off the flow of information regarding the availability of legal counsel just when the accident victim is most in need.

The irrationality of Florida's ban is underscored by the fact that Florida has at its disposal a number of simple alternatives which would better achieve the asserted goal without abridging First Amendment rights. One far less intrusive option would be to impose a reasonable "cooling off" period, during which the accident victim or relative could repudiate any contract—including retainer agreements, settlements, and waivers—within a set period of time. That kind of device, which is now commonplace in other consumer transactions (*e.g.*, 16 C.F.R. § 429.1 (1992)), would avoid First Amendment problems, yet would directly advance Florida's interest in assuring that vulnerable accident victims, whose judgment might be impaired, are not exploited.

Another option would be for Florida to enact a statute that is both limited to wrongful death cases and universal in its sweep, forbidding all lawyers, insurance adjusters, and agents from making any contact at all with the grieving families for a set period of time. Both limitations are essential. The limitation to wrongful death cases rectifies the unjustifiably broad sweep of the current ban, which forbids direct-mail communications without regard to the severity of injury. There is no reason to assume that someone who has broken a leg in a minor automobile accident needs special protection by the state from lawyer solicitation letters. The second limitation addresses the underinclusiveness problem. While we would still question the constitutionality of any ban extending to direct mail solicitation—a practice we believe is innocuous—at least the rule would actually serve the interest of preserving the privacy of people in fact likely to be traumatized, unlike the ban at issue here.

Because the rule that Florida has enacted does not serve the purpose Florida asserts, and in fact undermines the interests of recent accident victims and their families, the Eleventh Circuit correctly invalidated the 30-day mailing ban.

CONCLUSION

For the reasons set forth above and in the brief of respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

David C. Vladeck
(Counsel of Record)
Alan T.L. Sun

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen, Inc.

December 5, 1994

Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

(12)

No. 94-226

DEC 6 1994

In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF HYATT LEGAL SERVICES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ANDREW KOHN
General Counsel,
Hyatt Legal Services
1215 Superior Avenue
Second Floor
Cleveland, Ohio 44114
(216) 694-4400

Counsel of Record

JOEL HYATT
Senior Partner,
Hyatt Legal Services
1215 Superior Avenue
Second Floor
Cleveland, Ohio 44114
(216) 694-4300

RICHARD D. MANOLOFF
14720 Clifton Boulevard
Lakewood, Ohio 44107
(216) 228-5140

Attorneys for Amicus Curiae

BEST AVAILABLE COPY

20 pp

TABLE OF CONTENTS

	Page
Table of Citations	ii
Identity and Interest of Amicus Curiae	1
Summary of Argument	2
Argument	3
I. *Bates* has benefitted the administration of justice in America.	4
A. *Bates* has increased access to the American judicial system through the effects of attorney advertising.	4
B. Permitting truthful attorney advertising has led to lower costs for legal services, which also increases access to the American justice system.	6
C. To the extent that *Bates* has served to increase real and perceived access to the American justice system, public perception of the legal profession has improved.	7
D. Experience has not shown that permitting attorney price advertising with respect to routine legal services undermines professional standards.	9
II. Attorney price advertising of routine legal services is not inherently misleading.	11
Conclusion	13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Bates v. State Bar, 433 U.S. 350 (1977) ..... *passim*

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 5

Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) 5, 7

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) 9, 10, 11

United States Constitution Cited:

First Amendment 1, 3

Other Authorities Cited:

Federal Trade Commission, *Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions or Truthful Advertising* 126-27 (1984) 7

Gay Jervey, *Joel Hyatt*, The American Lawyer, March 1989 ..... 5, 8

Geoffrey C. Hazard *et al. Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084 (1983) 7

Contents

Page

APPENDIX

Appendix A — Letters of Consent 1a

IDENTITY AND INTEREST OF AMICUS CURIAE

Hyatt Legal Services respectfully submits this brief as amicus curiae in support of Respondents. Letters of consent of the parties to file this brief are copied and appear in the Appendix, *infra*.

Hyatt Legal Services was established in 1977, in direct response to *Bates v. State Bar*, 433 U.S. 350 (1977). In *Bates*, this Court held that truthful attorney advertising concerning the availability and price of routine legal services is commercial speech protected against an outright state prohibition by the First Amendment. From its founding, Hyatt Legal Services has provided routine legal services throughout the United States, and has engaged heavily in truthful advertising concerning such services.

Petitioner contends that *Bates* precipitated an erosion of public confidence in the legal profession and has, in turn, negatively affected the administration of justice. Petitioner and other amici curiae call upon this Court to "revisit" *Bates* and "return to the States the latitude to weigh the value to the public of attorney commercial solicitation against the adverse effects of such solicitation." Brief of Petitioner at 24; *see also* Amici Curiae Brief of Alabama State Bar Ass'n *et al.*, at 4; Amici Curiae Brief of the Dade County Trial Lawyers Ass'n & the American Bd. of Trial Advocates at 17 [hereinafter Brief of Dade County Trial Lawyers]; Amicus Curiae Brief of the Academy of Florida Trial Lawyers at 2. Responding affirmatively to their call would presumably permit states to prohibit completely, attorney advertising, as Arizona did before *Bates*.

Perhaps like no other organization or firm in this country, Hyatt Legal Services is able to speak to the positive effects of *Bates* on the American legal system, and thus counter with data and evidence the asserted but largely unsupported claims of

Petitioner and other amici curiae. Hyatt Legal Services believes the settled *Bates* precedent should be reaffirmed, not "revisited," by this Court.

SUMMARY OF ARGUMENT

In important ways, the *Bates* decision has positively affected the public perception of the legal profession and the administration of justice.

The promise of justice without access to it has long been a frustration of many Americans. Prior to *Bates*, the middle class was not poor enough to qualify for free legal aid but felt not rich enough to obtain high-cost legal services, and was often shut out of the American justice system. What *Bates* did was permit attorneys to reach out to this large sector of the American populace which often has very basic legal needs. The experience of Hyatt Legal Services is that truthful advertising of routine legal services has greatly expanded access to the American justice system.

Increased access to the justice system has, in turn, improved public regard for it. No longer is the justice system the sole province of the wealthy. It is now accessible and affordable to average Americans, too. The files of Hyatt Legal Services overflow with stories of individuals who were satisfied with the legal profession for the first time by being exposed to convenient, low-cost, routine legal services. Without *Bates*, the economies of scale to bring down the cost of such services, and the ability to inform the public that such services are available, would not have been possible.

The experience of Hyatt Legal Services also calls into question other arguments for "revisiting" *Bates*. It is the experience and view of Hyatt Legal Services that routine legal

services do indeed exist, and can be performed for a set fee without sacrificing professional standards or quality.

ARGUMENT

In *Bates*, the Court generally held that attorney advertising is a form of commercial speech subject to First Amendment protection. Specifically, it held that states may not place an outright ban on attorney price advertising with respect to routine legal services.

In reaching this decision, the Court examined whether attorney advertising is inherently misleading, and found that it is not. *Bates*, 433 U.S. at 372-75. It also considered certain specific interests that states might have in banning attorney advertising — its alleged adverse effect on professionalism; its alleged adverse effect on the administration of justice; its alleged undesirable economic effects; its alleged adverse effect on the quality of service; and certain alleged enforcement difficulties — and found them insufficient to outweigh an attorney's First Amendment right to commercial speech. *Id.* at 368-72, 375-79.

Petitioner and amici contend that the Court in *Bates* did not properly evaluate the nature of attorney advertising or properly assess or anticipate the impact of attorney advertising on the legal profession and the administration of justice. Petitioner contends that, since *Bates*, "the great bulk of attorney advertising provides citizens with little or no useful information" and, worse, has "resulted in a negative perception of, and loss of confidence in the legal profession." Brief of Petitioner at 14. This, Petitioner and amici suggest, has negatively impacted the administration of justice in America. *See id.* at 20; *see also* Brief of Dade County Trial Lawyers at 7, 9-12; Amicus Curiae Brief of the Association of Trial Lawyers of America at 13. This distorted picture does not tell the real story.

I.

BATES HAS BENEFITTED THE ADMINISTRATION OF JUSTICE IN AMERICA.

In *Bates,* Justice Powell predicted that establishing First Amendment protection for attorney advertising would "effect profound changes in the practice of law." 433 U.S. at 389 (Powell, J., concurring in part and dissenting in part). He was right. On balance, these changes have improved our justice system.

A. *Bates* has increased access to the American judicial system through the effects of attorney advertising.

To receive the justice promised by the American judicial system, Americans with legal claims must first find access to it. The Court in *Bates* recognized the fact that attorney advertising would assist Americans in obtaining such access:

> As the bar acknowledges, "the middle 70% of our population is not being reached or served adequately by the legal profession." ABA, Revised Handbook on Prepaid Legal Services 2 (1972). . . . Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. . . . Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the

> unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." ABA Code of Professional Responsibility EC 2-1 (1976).

Bates, 433 U.S. at 376-77; *see also Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 110 (1990) ("A principal reason why consumers do not consult lawyers is because they do not know how to find a lawyer able to assist them with their particular problems. Federal Trade Commission, Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions of Truthful Advertising 1 (1984)."); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 473 n.4 (1978) ("As we noted . . . in *Bates,* there appears to be substantial underutilization of lawyers' services. . . . This problem may be especially acute among the middle-class majority of this country, persons too affluent to qualify for government-funded legal services but not wealthy enough to afford the fees of the major law firms that serve mostly corporate clients.").

The experience of Hyatt Legal Services proves what was presumed in *Bates.* The federal constitutional floor established by *Bates* enabled Hyatt Legal Services to advertise up-front legal fees for routine services such as uncontested divorces and simple wills. In large part due to the success of its straightforward advertising, Hyatt Legal Services has been able to provide legal services to approximately 2 1/4 million Americans in the last 17 years. According to a 1989 survey, 45% of the then 1 1/2 million Hyatt Legal Services clients had never before visited a lawyer. *See* Gay Jervey, *Joel Hyatt,* The American Lawyer, March 1989, at 90. Thus, in the experience of just one firm, hundreds of thousands of Americans accessed our judicial system and

obtained legal services for the first time as a result of the *Bates* decision.

B. Permitting truthful attorney advertising has led to lower costs for legal services, which also increases access to the American justice system.

In 1984, staff members of the Federal Trade Commission concluded a detailed empirical investigation into the effects of attorney advertising. Surveying approximately 3200 attorneys in 17 states, the group determined that attorney advertising served to reduce prices for legal services:

> The study provides convincing support for the proposition that greater flexibility to engage in non-deceptive advertising will be associated with lower prices for consumers of legal services. . . . [T]here appears to be a continuous relationship between prices and regulations, with the lowest prices associated with the fewest restrictions on attorney marketing practices.
>
> . . . Furthermore, the study provides evidence for the proposition that as advertising increases in the legal services market, prices will decline. We also found support for the theory that advertising will exert a pro-competitive influence on the market. . . . The empirical data, therefore, support the information theory of advertising and establish strong evidence for relaxing unnecessary restrictions on truthful, non-deceptive advertising practices.

Federal Trade Commission, *Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions of Truthful Advertising* 126-27 (1984).

The experience of Hyatt Legal Services provides some insight into how attorney advertising can effectively reduce prices for certain legal services aside from exerting a pro-competitive influence on the market. By being able to advertise nationwide, Hyatt Legal Services was able to achieve economies of scale for the provision of certain routine legal services that it simply could not have achieved otherwise. These economies of scale enabled Hyatt Legal Services to provide legal services with respect to uncontested divorces and simple wills, for example, at below-average prices. *Cf.* Jervey, *supra*, at 95. *See generally* Geoffrey C. Hazard *et al.*, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084, 1107-09 (1983) (providing economic rationale for why prices for "standardizable" legal services should decrease with increase in attorney advertising).

Legal trade associations, representing the pecuniary interests of their members, opposed Hyatt Legal Services as it sought to introduce price competition through advertising. Those battles were won by Hyatt Legal Services, as *Bates* helped pave the way to introduce real price competition through attorney advertising.

C. To the extent that *Bates* has served to increase real and perceived access to the American justice system, public perception of the legal profession has improved.

As attorney advertising helped the "middle 70%" of our population gain access to legal services, the justice system became a system that works for all, and no longer a system that serves solely the socio-economic elite. Petitioner and amici argue

that the image and reputation of lawyers have suffered as a result of attorney advertising. But their argument misses the more important point that attorney advertising, by increasing access to the legal profession, increases public regard for it. The experience of Hyatt Legal Services provides ample evidence of this. Consider the following account, reported in *The American Lawyer,* March 1989, at 88, 90 (emphasis in original):

> A housewife in suburban Akron, Ohio — we'll call her Sheri Smith — was desperate. For three years her husband, Tom, a 48-year-old former construction worker suffering from congenital heart disease, had been unemployed while he waited for a heart transplant. Between caring for three children and an ailing husband, Sheri was unable to work. The Smiths could no longer turn a blind eye to their mounting bills. They could no longer stave off the inevitable: declaring bankruptcy.
>
> "I had absolutely *no* idea where to turn," Mrs. Smith recalls. "I was terrified of lawyers, those prices and all, maybe 'cause I'd been to an attorney once before and had gotten nowhere. I was totally dissatisfied with the whole ordeal. Every hour they spend, *whooey!* More money out of you. And then they don't tell you what's going on. They don't care."

Sheri Smith turned to Hyatt Legal Services because she saw a television advertisement. In the end, Smith says, "[t]hey didn't make us feel like scudbutters who had just run out on things. They not only helped us legally but made us feel better, too." *Id.* at 90.

There are countless examples of individuals who, like Sheri Smith, have gained satisfaction with the legal profession and the workings of the judicial system as a result of the demystification of legal services in the wake of *Bates.*

Some lament that people like Sheri Smith are causing the wheels of justice to grind to a halt under the heavy load of lawsuits. To the extent that justice under the law is delayed by increased utilization of legal services, the solution lies with streamlining judicial structures or increasing judicial personnel — it does not lie with restricting access. Such American promises as "equal protection" and "due process" are merely hollow words without access to the justice system. *Bates* has enabled Hyatt Legal Services and many other firms to provide such access for millions of Americans.

D. Experience has not shown that permitting attorney price advertising with respect to routine legal services undermines professional standards.

In her dissent in *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466 (1988), Justice O'Connor expresses the concern that attorney price advertising with respect to routine services might serve to undermine professional standards:

> [S]uch advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all. For a lawyer to promise the world that such matters as uncontested divorces can be handled for a flat fee will inevitably create incentives to ignore (or avoid discovering) the complexities that

> would lead a conscientious attorney to treat some clients' cases as anything but routine.

Shapero, 486 U.S. at 485-86 (O'Connor, J., dissenting). Justice O'Connor apparently views this concern (in conjunction with a concern relating to the alleged inherently misleading nature of attorney price advertising for routine legal services — see II. below) as significant enough to justify a complete state ban on attorney price advertising of routine legal services. *Id.* at 485.

Hyatt Legal Services' extensive experience proves that this concern has not been borne out. One might expect that unacceptable legal work performed for a flat fee would be eventually detected by clients, and complaints filed. From 1990 to 1993, however, Hyatt Legal Services handled more than 530,000 cases, with fewer than .02% of these resulting in a malpractice complaint. Only a handful of these were found to be meritorious.

One of the chief reasons why professional standards are not undermined as Justice O'Connor fears is that prices for routine legal services can be set at the average cost of a particular casetype. In other words, the business decision to establish a set price takes into account that fact that some cases may require more work than others. The promise made to clients is not that their uncontested divorce, for example, can be handled for $X worth of work, but that their uncontested divorce will cost them $X. In this way, fear of the cost — one of the principal reasons middle-income people do not seek legal help — is eliminated.

II.

ATTORNEY PRICE ADVERTISING OF ROUTINE LEGAL SERVICES IS NOT INHERENTLY MISLEADING.

Chief Justice Burger, writing separately in *Bates*, claimed that "[b]ecause legal services can rarely, if ever, be 'standardized' and because potential clients rarely know in advance what services they do in fact need, price advertising can never give the public an accurate picture on which to base its selection of an attorney." 433 U.S. at 386 (Burger, C.J., concurring in part and dissenting in part); *see also id.* at 392-94 (Powell, J., concurring in part and dissenting in part); *Shapero*, 486 U.S. at 485 (O'Connor, J., dissenting).

The majority in *Bates* squarely confronted the issue of whether attorney price advertising of routine legal services is inherently misleading:

> Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price. The argument that legal services are so unique that fixed rates cannot meaningfully be established is refuted by the record in this case: The appellee State Bar itself sponsors a Legal Services Program in which the participating attorneys agree to perform services like those advertised by the appellants at the standardized rates. . . .
>
> . . . It is unlikely that many people go to an attorney merely to ascertain if they have a

> clean bill of legal health. Rather, attorneys are likely to be employed to perform specific tasks. Although the client may not know the detail involved in performing the task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself.

Bates, 433 U.S. at 372-74.

Hyatt Legal Services' experience demonstrates that routine legal services do in fact exist, and that set fees can successfully be charged for such services. While life circumstances necessarily differ from client to client, material legal circumstances and the legal work necessary to address these circumstances often do not. Not all uncontested divorces, for example, are factually complicated. Even those that are factually complicated most often are not legally complicated. Though it often had to fight the legal establishment to do so, Hyatt Legal Services has offered set fees (again, based on pricing to the average case) for simple divorces, simple deeds, simple guardianships, simple adoptions, etc., for 17 years. Literally millions of clients have sought and obtained such services for the set fee.

CONCLUSION

Hyatt Legal Services, amicus curiae, respectfully urges this Court to uphold and reaffirm the basic federal constitutional protections afforded attorney advertising in *Bates* and its progeny.

Respectfully submitted,

JOEL HYATT
Senior Partner, Hyatt Legal Services
1215 Superior Avenue, Second Floor
Cleveland, Ohio 44114
(216) 694-4300

RICHARD D. MANOLOFF
14720 Clifton Boulevard
Lakewood, Ohio 44107
(216) 228-5140

Attorneys for Amicus Curiae

ANDREW KOHN
General Counsel, Hyatt Legal Services
1215 Superior Avenue, Second Floor
Cleveland, Ohio 44114
(216) 694-4400

Counsel of Record

APPENDIX A — LETTERS OF CONSENT

BRUCE S. ROGOW, P.A.

2441 S.W. 28th AVENUE
FORT LAUDERDALE, FLORIDA 33312

(305) 767-8909 / FAX (305) 764-1530

November 30, 1994

Joel Hyatt
Hyatt Legal Services
1215 Superior Ave. 2nd Floor
Cleveland, OH 44114

FAX 216-694-4305

Re: The Florida Bar v. McHenry No. 94-226

Dear Mr. Hyatt:

This will confirm that respondents consent to your filing an *amicus curiae* brief in the above-named case in the Supreme Court of the United States.

Please note that by special order of the Court, all briefs must be *received* by the Clerk's office and by counsel for the parties by 3:00 p.m. on Tuesday, December 6, 1994. If necessary, we will accept service by FAX.

If I may be of any further assistance, please feel free to contact me.

Yours truly,
s/ Bruce Rogow
BRUCE ROGOW
Counsel of Record for Respondents

Appendix A

NO.94-226

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART MCHENRY, and WENT FOR IT, INC.,

Respondent.

CONSENT TO FILING AMICUS BRIEF

Petitioner, The Florida Bar, consents to the filing of an amicus brief by Hyatt Legal Services.

GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301
(904) 222-6891

s/ Barry Richard
BARRY RICHARD
Florida Bar No. 0105599

Appendix A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing consent has been served upon Bruce Rogow, Esquire, 2441 S.W. 28th Avenue, Ft. Lauderdale, Florida 33312 and Beverly A. Pohl, Esquire, 350 S.E. Second St., Ft. Lauderdale Florida 33301 on this 2nd day of December, 1994.

s/ Barry Richard
BARRY RICHARD

Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

No. 94-226 (13)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE FLORIDA BAR,
Petitioner,
v.
G. STEWART MCHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* INSTITUTE FOR ACCESS TO LEGAL SERVICES, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, STATION REPRESENTATIVES ASSOCIATION, INC., NATIONAL LAW FIRM MARKETING ASSOCIATION, YELLOW PAGES PUBLISHERS ASSOCIATION, TELEVISION BUREAU OF ADVERTISING IN SUPPORT OF RESPONDENTS

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
NOKY MILLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for Amici
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

28 pp

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE RULE ANNOUNCED IN *BATES* HAS BEEN ELABORATED IN SUBSEQUENT DECISIONS AND IS ENTIRELY CONSISTENT WITH RELATED PRINCIPLES OF FIRST AMENDMENT DOCTRINE	7
A. The *Bates* Rule Parallels The First Amendment Protection Accorded To Advertising By Other Professions And To Commercial Speech In General	7
B. The "Institutional" Decisions Relied On By Petitioner Are Not Analogous	9
II. THE FACTS UNDERLYING THIS COURT'S DECISIONS IN *BATES* AND ITS PROGENY ARE UNCHANGED	11
A. *Bates*'s Finding That Attorney Advertising Can Provide Useful Information And Serve Important Social Needs Is Unchanged	11
B. *Bates*'s Finding That Attorney Advertising Will Not Erode Actual Professionalism Is Unchanged And Unchallenged	15
1. Empirical evidence	15
2. The proposed rule of law	18
III. THE RULES ANNOUNCED IN *BATES* AND ITS PROGENY HAVE PROVED WORKABLE AND HAVE BEEN HEAVILY RELIED ON	19
A. There Is No Showing That States Have Been Unable To Police Constitutional Restrictions On Attorney Advertising	19

TABLE OF CONTENTS—Continued

Page

B. Many Commercial Arrangements Have Been Based On This Court's Attorney Advertising Decisions 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page

Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992) 8
Bates v. State Bar of Arizona, 433 U.S. 350 (1977) ..... *passim*
Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 11
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 11
Edenfield v. Fane, 113 S. Ct. 1792 (1993) ..... *passim*
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 9, 10
Ibanez v. Florida Dep't of Business and Professional Regulation, 114 S. Ct. 2084 (1994) 7, 11
In re R.M.J., 455 U.S. 191 (1982) 7
Parker v. Kentucky Bd. of Dentistry, 818 F.2d 504 (6th Cir. 1987) 8
Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281 (1990) 7
Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) ..... *passim*
Primary Care Physicians Group, P.C. v. Ledbetter, 634 F. Supp. 78 (N.D. Ga. 1986) 8
Rosenburg v. Dep't of Professional Regulation, 488 So. 2d 153 (Fla. App. 1986) 8
Shapero v. Kentucky Bar Ass'n., 486 U.S. 466 (1988) 6, 7, 8
Vasquez v. Hillery, 474 U.S. 254 (1986) 4, 6
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 11
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 6, 7, 8

MISCELLANEOUS

All Industry Research Advisory Council Report, *Compensation for Automobile Injuries in the United States* (March 1989) 13
American Bar Association, *Findings of the Comprehensive Needs Study* (1994) 12, 13

TABLE OF AUTHORITIES—Continued

	Page
American Bar Association, *Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally* (1989)	12, 13
American Bar Foundation, *The Legal Needs of the Public* (1977)	12
Cox, DeSerpa and Canby, *Consumer Information and the Pricing of Legal Services*, XXX J. Indus. Econ. (1982)	14
FTC, Cleveland Regional Office and Bureau of Economics, Report of the Staff to the FTC, "Improving Consumer Access to Legal Services: The Case for Removing Reductions on Truthful Advertising" (Nov. 1984)	14
Geoffrey C. Hazard, Jr., et al., *Why Lawyers Should Be Allowed To Advertise: A Market Analysis Of Legal Services*, 58 N.Y.U.L. Rev. 1084 (1983)	13
Gary Hengstler, "Vox Populi: The Public Perception of Lawyers: ABA Poll," *ABA Journal* (Sept. 1993)	16, 17
Insurance Research Council, *Auto Injuries: Claiming Behavior and Its Impact on Insurance Costs* (September 1994)	12
Fred S. McChesney, *Advertising and the Price and Qualty of Legal Services: The Case for Legal Clinics*, 1979 Am. B. Found. Res. J.	14
Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. Pa. L. Rev. (1985)	14
"National Law Journal/West Publishing Co. Poll Shows Public Has Diminishing Respect for Attorneys," *National Law Journal* (Aug. 9, 1993)	16, 18
Claire Rattigan, "Overseers Not After Lawyer Ads," 22 *Massachusetts Lawyers Weekly* (May 9, 1994)	19
Rhode Island Bar, *Ad Hoc Committee on Lawyer Advertising Report* (April 6, 1994)	17

TABLE OF AUTHORITIES—Continued

	Page
Shroeter, Smith and Cox, *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, XXXVI J. Indus. Econ. (1987)	14
Terry Calvani, et al., *Attorney Advertising and Competition at the Bar*, 41 Vand. L. Rev. (1988)	14
"The Real Enemies of Lawyer Advertising," *Texas Lawyer* (June 14, 1993)	13
Weiss Research Associates, *Attorney Advertising/ Perceptions Study* (April 1994)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-226

THE FLORIDA BAR,

Petitioner,

v.

G. STEWART MCHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF *AMICI CURIAE* INSTITUTE FOR ACCESS TO LEGAL SERVICES, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, STATION REPRESENTATIVES ASSOCIATION, INC., NATIONAL LAW FIRM MARKETING ASSOCIATION, YELLOW PAGES PUBLISHERS ASSOCIATION, TELEVISION BUREAU OF ADVERTISING IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

Amici Curiae have a strong interest in the continued vitality of this Court's decision in *Bates v. State Bar of*

---

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

Arizona, 433 U.S. 350 (1977), and the long line of decisions that have followed from *Bates*. *Amici* are public interest groups, media groups, professional associations, and attorney groups committed to the constitutional protection of commercial speech and to attorney advertising as a means of providing broad access to legal services. Many have been involved in defending or disseminating attorney advertising.

The Institute for Access to Legal Services is a national organization formed by attorneys in 1989 to educate the public and professionals about the public benefits of attorney advertising and to fight attempts to re-regulate the right to advertise. The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit association that serves and represents nearly 5,000 radio stations, more than 950 television stations, and the major television networks, and seeks to preserve and enhance its members ability to disseminate information concerning commercial activities freely. The National Resource Center for Consumers of Legal Services is a non-profit research and educational organization committed to improving the delivery of legal servies, with a primary emphasis on legal services plans. The Association of National Advertisers, Inc., is exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis; its members account for almost 80 percent of the nation's annual national and regional advertising expenditures. The American Advertising Federation serves 50,000 members involved in creating, producing, buying, selling, placing, broadcasting, and publishing advertising. The American Association of Advertising Agencies represents more than 650 advertising agencies with more than 1,700 offices throughout the United States, which place 80 percent of all national advertisements and substantial portions of regional and local advertising. Station Representatives Association, Inc., represents the industry that, on behalf of radio stations, television stations, and cable systems, sells national and regional spot

advertising. The National Law Firm Marketing Association is a non-profit association representing more than 1,100 members involved in marketing for the legal profession. The Yellow Pages Publishers Association represents 191 publishers who publish more than 95 percent of all Yellow Pages directories, 156 certified marketing representatives who sell Yellow Pages advertising, and 76 suppliers to the Yellow Pages industry. The Television Bureau of Advertising was formed in 1954 to promote spot television advertising to potential advertisers on behalf of its more than 300 broadcast television station members.

Amici believe they can make a significant contribution to the Court's consideration of the nature and scope of First Amendment protection accorded to attorney advertising. *Amici* include groups that have commissioned and compiled national empirical studies of consumer attitudes toward attorneys and attorney advertising, and have participated in American Bar Association appraisals of attorney advertising. *Amici* can therefore provide a national perspective against which Petitioner's call to overrule *Bates* may be assessed.

INTRODUCTION AND SUMMARY OF ARGUMENT

For seventeen years, this Court has repeatedly held that the First Amendment protects professional advertising in general and attorney advertising in particular, and that restrictions premised on no more than an interest in preserving the "dignity" of the profession may not constitutionally be imposed. These decisions were based on the recognition that truthful commercial information "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). *Bates*, and the consistent line of subsequent decisions recognizing that the First Amendment confers

substantial protection for advertising by attorneys and other professionals, flows inexorably from this Court's recognition that commercial information is too valuable to be suppressed for inconsequential or speculative reasons. By asking the Court to overrule this entire line of decisions, the Florida Bar has undertaken a "heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis*" should "yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). The Bar has not met, and cannot meet, that burden here.[2]

The Florida Bar's call for the Court to repudiate seventeen years of precedent is *not* premised on *evidence* that First Amendment protection for attorney advertising has resulted in poor representation of clients, or in overreaching or other improper behavior by attorneys. The Florida Bar has asked this Court to reverse itself on the ground that the Bar would like its members to enjoy a better reputation. The Florida Bar does not dispute the importance or effectiveness of attorney advertising in facilitating access to legal services for low and moderate-income clients. Accordingly, the Bar is arguing that the prestige of lawyers is more important than broad access to legal services. The Court weighed and rejected that very argument in *Bates*. 433 U.S. at 368. Further, the argument rests entirely on the unproved and incorrect premise that attorney advertising is the sole or primary cause of negative attitudes toward attorneys, and if there were no advertising, the public would hold lawyers in high regard. That premise is squarely contradicted by empirical research, as will be demonstrated in Point II, *infra*.

Nothing presented by the Bar or its *amici* is sufficient to justify overruling *Bates*. Each of the four factors iden-

[2] *Amici Curiae* address only the first question presented for review by Petitioner: whether the Court should overrule *Bates v. State Bar of Arizona* and its progeny. *Amici* take no position on the constitutionality of the specific regulation at issue.

tified in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992), for testing whether precedent should be overruled cuts against such a course. The application of the commercial speech doctrine to attorney advertising remains consistent with this Court's First Amendment jurisprudence. The factual underpinnings of *Bates* remain accurate and meaningful. Time has shown that attorney advertising informs the public generally about legal services and encourages a broader access to legal services than the traditional country club-type business development methods, but does not cause attorneys to act less professionally. The rules announced in *Bates* and its progeny have not proved unworkable as a practical matter. And there has been considerable commercial reliance on this Court's unbroken line of decisions upholding attorney advertising.

Therefore, *amici* urge this Court to reject the Florida Bar's invitation to cast aside the Court's long-settled understanding that states may not constitutionally ban truthful, non-misleading attorney advertising on the ground that it "tarnish[es] the dignified public image of the profession." *Bates*, 433 U.S. at 368.

ARGUMENT

Respect for precedent is indispensable because it "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez*, 474 U.S. at 265-66. For this reason, the Court is institutionally committed to stand by its decisions so long as "the understanding of the issue has not changed so fundamentally as to render the commitment obsolete." *Casey*, 112 S. Ct. at 2815.

The understanding of the issue of attorney advertising has not changed "fundamentally." It has not changed at all. The objections raised by the Florida Bar here were raised by the Arizona State Bar in *Bates*, and expressly rejected. *See Bates*, 433 U.S. at 368. The Court has consistently rejected the same or similar arguments in subsequent cases. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993). The principle of *stare decisis* thus has *particular* force here because the Florida Bar's arguments for overruling the Court's previous decisions are the same arguments raised—and rejected—repeatedly, consistently, and recently, in the very decisions challenged by Petitioner.

In *Casey*, this Court identified four "prudential and pragmatic considerations" for testing "the consistency of overruling a prior decision with the ideal of the rule of law." *Casey*, 112 S. Ct. at 2808. *Stare decisis* is less compelling where (1) "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; (2) "facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification"; (3) "the rule has proved to be intolerable simply in defying practical workability"; and (4) the rule is not

"subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Id.* at 2808-09. None of these considerations applies to *Bates* and its progeny. The rule of law, as well as the consumers *Bates* and subsequent decisions were intended to help, would thus be ill-served by overturning that body of jurisprudence.

I. THE RULE ANNOUNCED IN *BATES* HAS BEEN ELABORATED IN SUBSEQUENT DECISIONS AND IS ENTIRELY CONSISTENT WITH RELATED PRINCIPLES OF FIRST AMENDMENT DOCTRINE.

A. The *Bates* Rule Parallels The First Amendment Protection Accorded To Advertising By Other Professions And To Commercial Speech In General.

Far from being "a remnant of abandoned doctrine," *Casey*, 112 S. Ct. at 2808, the *Bates* rule is a cornerstone of a consistent and developed doctrine of commercial speech.[3] Indeed, last Term and the previous Term, this Court applied *Bates*'s reasoning to advertising by *other* licensed and regulated professionals. *See Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084 (1994) (prohibition against advertising accounting certifications invalidated); *Edenfield*, 113 S. Ct. 1792 (prohibition against in-person solicitation by CPA invalidated). Lower courts have applied the same prin-

---

[3] *See In re R.M.J.*, 455 U.S. 191 (1982) (invalidating restrictions on attorneys' advertising their areas of practice, jurisdictions in which they are licensed, and their opening of a new office); *Zauderer*, 471 U.S. 626 (1985) (invalidating prohibitions against attorney advertisements using illustrations or targeting a specific legal problem); *Shapero*, 486 U.S. 466 (1988) (invalidating prohibition of targeted direct mail by attorneys); *Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281 (1990) (invalidating prohibition against attorney advertising of nationally-recognized certification).

ciples to advertising by psychologists, dentists, physicians, and chiropractors.[4]

Moreover, this Court has not merely upheld *Bates*'s recognition that professional advertising is commercial speech protected by the First Amendment, it has revisited and reaffirmed the specific holdings challenged by the Florida Bar. The Florida Bar today, like the Arizona Bar in *Bates*, argues that attorney advertising threatens the public "image" of the profession. Pet. Br. at 6; 433 U.S. at 368. The Court's rejection of that argument in *Bates* was based on its skepticism that advertising alone would "diminish the attorney's reputation in the community," 433 U.S. at 369, and its conclusion that, *in any event*, consumers' interest in obtaining information about professional services far outweighs any risk that recognition of the commercial nature of professional services poses to the "dignified public image of the profession," *id.* at 368.

Eight years later, in *Zauderer*, 471 U.S. at 648, the Court again rejected the "dignity" argument, expressing doubt that "the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgement of their First Amendment rights," and holding that the possibility that some people might find the advertising offensive "cannot justify suppressing it." The Court rejected the same argument again three years later. *See Shapero*, 486 U.S. at 480. And, only two Terms ago, in *Edenfield*, the Court addressed and rejected the identical "dignity" argument applied to the profession of accounting. As it always has, the Court accorded the state's interest in ensuring ethical and responsible *behavior* by professionals full regard, but dismissed the Florida Board of Accountancy's claim that "the public perception of CPA independence will be undermined if CPAs behave like ordinary commercial actors." *Edenfield*, 113 S. Ct. at 1799-1800. Citing *Bates*, the Court rejected any state interest in hiding the commercial nature of professional services from the public, and scrutinized the restriction not in terms of its effect on the profession's "image" but solely in terms of its effect on the profession's behavior. *Id.* at 1800-04.

[4] *See, e.g., Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992) (psychologist advertising restriction invalidated); *Parker v. Kentucky Bd. of Dentistry*, 818 F.2d 504 (6th Cir. 1987) (prohibition against dentists advertising specialty invalidated); *Primary Care Physicians Group, P.C. v. Ledbetter*, 634 F. Supp. 78 (N.D. Ga. 1986) (physician advertising restriction invalidated); *Rosenburg v. Dep't of Professional Regulation*, 488 So. 2d 158 (Fla. App. 1986) (prohibition of chiropractor ads if "tasteless" invalidated).

B. The "Institutional" Decisions Relied On By Petitioner Are Not Analogous.

Aware that *Bates* is fully consistent with this Court's commercial speech jurisprudence, the Florida Bar's response is that attorney advertising should be evaluated in light of this Court's decisions on speech in public schools, government offices, prisons, and military bases. However, those cases provide *no* support for the types of restrictions on attorney advertising that existed before *Bates*.

The restrictions on speech in public schools, prisons, and military bases were upheld by this Court because the property where the speech occurred was owned by the government, and the government was permitted to ensure that its own property was not used in ways that interfered with the government's objectives. In the public school case on which the Bar relies most heavily, for example, the Court upheld the school's power to remove a story from a newspaper *owned* by the school, *financed* by the school, and *operated* by the school *as part of its curriculum*. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

The Court carefully inquired whether the newspaper, although owned by the school, had been operated as a public forum—in which case the school would have lost its ability to censor the contents. *Id.* at 268-70. There was no doubt that a student, off school premises, was free

to exercise the full range of First Amendment freedoms. *Id.* at 266. The question before the Court was whether the school had so dedicated its own property to public use that it had lost the ability to refuse to affirmatively promote *someone else's* speech. *Id.* at 270-71.[5]

The decisions in *Hazelwood et al.*, however, have no relevance to the restrictions that may constitutionally be imposed on an attorney in private practice who wishes to purchase space in a private advertising directory or time on a private broadcast station to reach potential clients in the private sector. The Florida Bar's attempt to work its way out of this dead end is to argue that lawyers play a role in the judicial branch of government and are therefore somehow transformed into government employees.

At most, that argument proves what has never been in dispute: governments may impose rules on how lawyers interact with the judiciary. Governments have long imposed rules on how lawyers may interact with the court system, including what they may say to or in a court. Furthermore, judges retain broad power to cite a lawyer for contempt, even if the sanctioned actions involve speech. But nothing at issue in this case, in *Bates*, or in any of the cases the Florida Bar wants overruled, involves such regulations.

Lawyers in private practice are not public employees, just as accountants who represent citizens before the Internal Revenue Service are not members of the executive branch, and citizens who testify before congressional committees are not members of the legislature. The method

[5] Prisons and military bases are likewise *owned* and *operated* by the government, and are not dedicated to public use. Unremarkably, this Court has found that the government has many of the same powers to control their use as would any private owner. Similarly, when the government undertakes a proprietary role, it enjoys some of the rights of a private employer in terms of demoting or firing an employee, including the power to fire an employee for speech that actually interferes with the agency's operations.

by which lawyers attract private clients does not affect the functioning of the court system in any way. Arguably, the filing of frivolous suits could affect the court system. But there is no intrinsic connection between advertising and frivolous suits, and the First Amendment does not preclude the government from prohibiting frivolous suits.

The "related principles of law" for *Bates* and its progeny are the principles this Court has consistently applied: the principles of the commercial speech doctrine, as developed in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Edenfield*, 113 S. Ct. 1792, and *Ibanez*, 114 S. Ct. 2084. And the development of the commercial speech doctrine since *Bates* has followed, solidified, and elaborated its analysis and decision. Thus, the first *Casey* factor weighs decidedly in favor of *stare decisis*.

II. THE FACTS UNDERLYING THIS COURT'S DECISIONS IN *BATES* AND ITS PROGENY ARE UNCHANGED.

A. *Bates*'s Finding That Attorney Advertising Can Provide Useful Information And Serve Important Social Needs Is Unchanged.

Bates premised its analysis not only on the general understanding that advertising is of value because it informs the public about the availability, nature, and price of services, *Bates*, 433 U.S. at 364, but also on the fact that the then-existing methods of attracting clients failed "to reach out and serve the [entire] community." *Id.* at 370. Citing studies showing that many who needed legal help were discouraged from obtaining it out of an exaggerated fear of the cost, or because of inexperience locating a competent attorney, the Court concluded that advertising "can provide some of the information that a

consumer needs to make an intelligent selection." *Id.* at 371.

Studies undertaken since *Bates* establish not only that the problems identified by the Court remain serious, but also that advertising appears to have ameliorated them. An American Bar Association ("ABA") study shows that, as recently as 1992, half of low and moderate-income households facing a legal problem did not recognize that they needed legal services or did not know how to obtain them. American Bar Association, *Findings of the Comprehensive Needs Study* (1994) ["*Comprehensive Needs Study*"]. ABA studies confined solely to low-income households demonstrate an even larger problem, but improvement since *Bates*. In the year *Bates* was decided, 90 per cent of low-income households facing a civil legal problem either did not realize it or did not know how to find a lawyer. American Bar Foundation, *The Legal Needs of the Public* (1977). Ten years after *Bates*, the number had dropped to 80 percent. American Bar Association, *Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally* 4 (1989) ["*Two Nationwide Surveys*"].

Surveys across income levels also show there is greater access to legal services than before *Bates*. ABA-sponsored studies in 1974 and 1989 discovered that a higher percentage of adults used lawyers for personal legal needs (such as wills, home purchase, divorce, and consumer problems) 12 years after *Bates* than five years before. *Id.* at 63-65. Studies of specific areas of legal practice also demonstrate that since *Bates* a higher percentage of people who need legal representation are receiving it. For example, between 1977 and 1992, there was a 67 percent increase in the number of individuals involved in automobile accidents who were represented by attorneys in negotiating with insurance companies.[6] Statistics available

[6] Insurance Research Council, *Auto Injuries: Claiming Behavior and Its Impact on Insurance Costs* 44 (September 1994).

for the period between 1977 and 1987 suggest that accident victims are more likely to obtain compensation when represented by attorneys than when negotiating on their own. For example, the amount recovered from insurance companies for automobile accidents increased 140 percent in that period, with more than 80 percent of that compensation paid to claimants represented by counsel.[7] Indeed, it is the very success of attorney advertising in reaching injured people who might otherwise have not been represented in their negotiations with insurance companies that has led some commentators to claim that the "real enemies of lawyer advertising" are "insurance companies and the businesses causing injuries who d[o] not want to deal with lawyers representing injured people." [8]

Advertising plays an especially important role for low and moderate-income Americans. Members of these groups receive most of their information about legal rights, and about attorneys who are willing to help them, from advertising.[9] The *Comprehensive Needs Study* found that 21 percent of low-income households and 11 percent of moderate-income households who hired an attorney found the attorney through an advertisement. *Comprehensive Needs Study* at 28.[10]

[7] *See* All Industry Research Advisory Counsel Report, *Compensation for Automobile Injuries in the United States* (March 1989).

[8] "The Real Enemies of Lawyer Advertising," *Texas Lawyer* 20 (June 14, 1993).

[9] *See, e.g.*, Geoffrey C. Hazard, Jr., et al., *Why Lawyers Should Be Allowed To Advertise: A Market Analysis Of Legal Services*, 58 N.Y.U.L. Rev. 1084, 1096 (1983).

[10] A 1989 ABA survey found that 11 percent of adults under 34 years old from all income levels relied on advertisements to choose an attorney, while only 2 percent of adults 55 or over did so. The survey also found that 14 percent of households in the middle third of the income scale relied on advertisements to choose an attorney, but only 8 percent in the highest third of the income scale did so. *Two Nationwide Surveys* at 84-85.

Furthermore, there is strong evidence that attorney advertising not only provides information about legal services to lower-income households but also provides greater access by reducing fees. The Federal Trade Commission's 1984 study found that the types of civil legal services most likely to be needed by lower-income households cost 5 to 13 percent more in states with restrictive attorney advertising rules than in states with liberal rules.[11] Researchers and commentators have concluded that advertising tends to lower the cost of legal services because it facilitates comparison shopping; increases the overall demand for legal services, which enables practitioners to employ economies of scale; provides attorneys with a less expensive method of attracting clients, and increases competition by lowering entry barriers.[12]

Thus, "the facts of economic life" for lawyers and potential clients are *not* different from those previously assumed, and therefore do not "warrant[] the repudiation of the old law." *Casey*, 112 S. Ct. at 2812. Advertising remains a vital tool for providing broad access to legal services. Moreover, the Florida Bar has not proposed any alternative means of reaching out to the *entire* community.

---

[11] *See* FTC, Cleveland Regional Office and Bureau of Economics, Report of the Staff to the FTC, "Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising" 77-117 (Nov. 1984). The study priced the cost of a simple will, a will with a trust provision, a personal bankruptcy, an uncontested divorce, and an automobile accident claim.

[12] *See, e.g.*, Terry Calvani, et al., *Attorney Advertising and Competition at the Bar*, 41 Vand. L. Rev. 761 (1988); Shroeter, Smith and Cox, *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, XXXVI J. Indus. Econ. 49 (1987); Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. Pa. L. Rev. 45 (1985); Cox, DeSerpa and Canby, *Consumer Information and the Pricing of Legal Services*, XXX J. Indus. Econ. 305 (1982); Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 Am. B. Found. Res. J. 179.

B. *Bates*'s Finding That Attorney Advertising Will Not Erode Actual Professionalism Is Unchanged And Unchallenged.

Bates was also premised on an assessment that permitting attorneys to advertise their services would not result in "the erosion of true professionalism." 433 U.S. at 368. The Florida Bar has not even challenged this factual underpinning. Nowhere does the Bar even suggest, much less prove, that attorney advertising has caused members of the bar to be less devoted to serving their clients and the public.

Instead, the Florida Bar's argument rests solely on its contention that the *prestige* of attorneys has diminished as a result of attorney advertising. As a basis for abandoning *stare decisis*, this has two critical weaknesses. First, the best evidence available makes clear it is untrue. Second, and more important, *Bates* would not be undermined even if the Florida Bar were factually correct.

1. *Empirical evidence.*

Recent national surveys confirm that the prestige of the legal profession is lower, at present, than many other professions; but they affirmatively do *not* confirm that attorney advertising is the cause. Indeed, when asked open-ended rather than suggestive questions—*e.g.*, why do you have a negative impression of attorneys, rather than whether advertising has contributed to your negative impression—most people explained that their opinions of the profession are based on personal experience with attorneys.

For example, a poll taken by the *National Law Journal* in 1993 found that fully 60 percent of respondents said they had a low opinion of lawyers, but 43 percent attributed their opinions—positive or negative—to past experience with lawyers. Another 24 percent said their opinions were based on news accounts; 10 percent named television shows; and 18 percent pointed to novels. Only 4 percent

said they thought the image of attorneys would be improved by eliminating attorney advertising. "National Law Journal/West Publishing Co. Poll Shows Public Has Diminishing Respect for Attorneys," *National Law Journal*, p. 1, col. 1 (Aug. 9, 1993) (poll of 815 random subjects) ["*NLJ Survey*"].

A 1994 study by Wiese Research Associates found a slightly more positive view of the profession as a whole—the mean rating was slightly more favorable than unfavorable—but the legal profession still rated lower than most other professions. Attorney Advertising/Perceptions Study 10-11 (April 1994) ["*Wiese Survey*"].[13] When respondents were asked why they had formed their opinions, the most common answer was negative personal experiences with lawyers. *Id.* at 19. Only two percent of those surveyed mentioned attorney advertising, when presented with this open-ended, rather than suggestive, question. *Id.* at 14-15. Even when asked how attorneys could improve their image—a question virtually inviting a public relations response—only six percent mentioned changing or eliminating attorney advertising. *Id.* at 18. The research group concluded "advertising does not appear to play a major role in consumers' image of the legal profession." *Id.*

A 1992 study by Peter D. Hart Research Associates Inc. of 1,202 adults for the ABA yielded similar results, leading the researchers to conclude that the more contact people have had with lawyers, the less favorable their impressions of the profession. *See* Gary Hengstler, "Vox Populi: The Public Perception of Lawyers: ABA Poll," ABA Journal 60, 61-62 (Sept. 1993) ["*1992 ABA Poll*"]. The strongest predictors of negative feelings were: having served on a jury and having been sued. *Id.* at

[13] The study was sponsored by the Yellow Pages Publishers Association for submission to the American Bar Association. The sample was random and resulted in 400 completed interviews.

62.[14] Similarly, the Rhode Island Bar's 1993-94 study found that consumers who had a negative impression of the profession in general said it was because lawyers did not return telephone calls, did not keep clients informed of the progress on their claims, did not adequately explain what documents were or why their clients were being asked to sign them. Rhode Island Bar, *Ad Hoc Committee on Lawyer Advertising Report* 4 (April 6, 1994). Attorney advertising was not even mentioned. *Id.*

Additional data from these studies suggest other factors that may play a role in the legal profession's reputation. For example, negative attitudes toward attorneys are not evenly distributed throughout income levels, races, ethnic backgrounds, or genders. Those who have traditionally been "have-nots" have far more favorable opinions of the legal profession than the "haves."

The 1992 ABA Poll discovered that African-Americans, Hispanics, low-income households, and women have more favorable opinions of the legal profession than college-educated white males with above-average salaries. *1992 ABA Poll* at 61. More than half the African-Americans and Hispanics surveyed (56 percent) expressed favorable views of lawyers. Twice as many women had favorable views (47 percent) than had negative views (26 percent). *Id.* at 61, 63. And those who received most of their information from television had more favorable attitudes towards lawyers (46 percent) than those who received most of their information from newspapers (32 percent). *Id.*[15] At least one commentator has suggested that one

[14] Lawyers again rated below most professionals, but above stockbrokers and politicians. Overall, 40 percent of those polled had a favorable view of the profession, 36 percent were negative, and 26 percent were undecided. *Id.* at 61-62.

[15] The *National Law Journal* poll yielded similar results. More than half of the African-American respondents had a positive view of the legal profession; but only 26 percent of white respondents did. More women (33 percent) had a positive view of attorneys

of the factors in the current anti-lawyer sentiment is a backlash against the use of the legal system to enforce and expand the rights of society's less privileged and the role of "lawyers as agents of equalizing change in society." *NLJ Survey* (quoting Professor Marc Galanter, University of Wisconsin Law School).

2. *The proposed rule of law.*

Even if the Florida Bar were correct that attorney advertising has affected the profession's current reputation, that fact would lack constitutional significance. This Court has never held that the state has a sufficient interest in the *image* of a profession to suppress the profession's right to speak or the public's right to listen. *See Bates,* 433 U.S. 368-69 (expressing disbelief that advertising alone was capable of diminishing a profession's reputation in the community, but invalidating the restriction at issue because it was not necessary to prevent erosion of professional *behavior*); *Edenfield,* 113 S. Ct. 1800 (expressing skepticism that a state could have a constitutionally cognizable interest in restricting advertising for the purpose of enhancing the image of accountants).

The Florida Bar confuses its very significant interest in ensuring that its members are worthy of the community's respect with a chimerical interest in shielding the public from information that might lead it to form a less flattering impression. Because there are no facts suggesting that attorney advertising has caused Florida attorneys to violate their obligation to serve their clients and the public, "no change in [*Bates*'s] factual underpinning has left its [] holding obsolete." *Casey,* 112 S. Ct. at 2812. Thus, the second *Casey* factor also weighs decidedly in favor of *stare decisis.*

---

than men (24 percent). And negative views of attorneys were far more prevalent in more comfortable economic brackets (47 percent of respondents earning between $50,000 and $75,000 per year) than among the very poor (only 27 percent of those earning less than $20,000 per year). *NLJ Survey.*

III. THE RULES ANNOUNCED IN *BATES* AND ITS PROGENY HAVE PROVED WORKABLE AND HAVE BEEN HEAVILY RELIED ON.

A. There Is No Showing That States Have Been Unable To Police Constitutional Restrictions On Attorney Advertising.

The Florida Bar has not alleged that it is unable to police constitutional restrictions on attorney advertising. No evidence has been submitted of any bar having difficulty enforcing such restrictions, nor has any explanation been offered why state bars would have greater difficulty policing the restrictions the Court has permitted than the restrictions the Court has invalidated.[16] Indeed, there is no evidence that there has even been any significant violation of constitutional restrictions on attorney advertising. Because advertising is by definition an activity occurring in public, and effective only when it is highly visible, violations would not be expected to elude discovery. Competitors, as well as consumers, have a strong interest in policing miscreants. Yet there is no evidence that bar associations have even received a significant number of complaints about individual advertisements, much less that they have been unable to deal effectively with any received.[17]

Further, the fact that courts have been involved in reviewing a continuing procession of new state restrictions under the rules announced in *Bates* and its progeny

---

[16] *Amici* Alabama State Bar Association, *et al.,* claim in their two-page brief that ensuring truthful price advertising remains a serious enforcement problem. Ala. Br. 3. Nonetheless, despite the many bar associations joining it, the brief does not include a single piece of even anecdotal evidence to support this bare allegation.

[17] In Massachusetts, for example, the Board of Bar Overseers received 2,200 grievance filings last year; only 1 percent were related to any type of lawyer advertising or solicitation. Claire Rattigan, "Overseers Not After Lawyer Ads," 22 *Massachusetts Lawyers Weekly* 1777 (May 9, 1994).

does not in any way suggest that the rules are unworkable. *See Casey*, 112 S. Ct. at 2809. As in *Casey*, the rule announced in *Bates* is "a simple limitation beyond which a state law is unenforceable." *Id.* And like the rule at issue in *Casey*, the *Bates* rule has not proved unworkable because, although it has "required judicial assessment of state laws affecting" the rights involved, "the required determinations fall within judicial competence." *Id.* Thus, the third *Casey* factor also weighs in favor of *stare decisis*.

B. Many Commercial Arrangements Have Been Based On This Court's Attorney Advertising Decisions.

Attorney advertising presents the "classic case for weighing reliance heavily in favor of following the earlier rule" because it involves "the commercial context, where advance planning of great precision is most obviously a necessity." *Casey*, 112 S. Ct. at 2809. (Citation omitted). Attorneys have organized law practices in reliance on advertising to attract clients. This has affected how they have organized their personal lives, how and whether they have chosen to establish an independent practice, and even what type of practice they have chosen to develop. Advertising, for example, provides a means of generating much greater volume than other methods of attracting clients, which has permitted some firms to establish the type of practice that can serve traditionally underserved middle class families.[18]

In addition, specialized advertising agencies have been organized to provide advertising services to lawyers [19] and

[18] Law firms have also relied on other business development methods—such as newsletters, seminars, press releases, letters to non-clients following up on a conversation at a public meeting, etc.—that would be precluded by some advertising restrictions bar associations have adopted or considered.

[19] For example, California-based R.W. Lynch Co. has specialized in providing group advertising to attorneys for ten years, and now provides group advertising in 45 states.

the various media that have carried attorney advertising have relied on the expected income from attorney advertising in shaping their businesses.[20] Reversing directions now, after 17 years of commercial reliance, would work a special hardship on all these enterprises. Thus, the final *Casey* factor also weighs in favor of *stare decisis*.

* * * *

There have been lawyers and bar associations, since *Bates* was before this Court, anxious to ban or severely restrict attorney advertising because, at least in part, they found it embarrassing. The attorney advertising made possible by *Bates* has little role in the elite practice of large law firms and prestigious specialists and would not be missed by them. But its role remains vital to the delivery of legal services to the poor, the less educated, the young, and even individuals of average means. Nothing has changed since *Bates* was decided that would justify changing direction. Indeed, all the evidence, and the considerable reliance on *Bates* in the structuring of new types of practice, makes clear that *Bates* was correctly decided in 1977 and is still needed today.

[20] Local television stations, for example, received $125 million in advertising receipts from legal services advertising in 1993. (Data supplied by Arbitron's MediaWatch Service covering the top 75 markets and compiled by Television Bureau of Advertising).

CONCLUSION

Amici urge this Court to reject the Florida Bar's invitation to overrule Bates and the many cases that have followed it.

Respectfully submitted,

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
NORY MILLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for Amici

* Counsel of Record